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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 200.

J. F. D. LANIER, CHARLES LANIER, JOHN W. ELLIS, EDWARD D. ADAMS, EDWARD WINSLOW, AND D. B. SAFFORD, PARTNERS AS WINSLOW, LANIER & CO., APPELLANTS,

vs.

JOHN NASH, ELLEN NASH, EDWARD PURCELL, WILLIAM H. WEST, JAMES WALKER, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED NOVEMBER 1, 1883.

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1 Pleas in the circuit court of the United States for the northern district of Ohio, western division, held at the United States court-rooms in the city of Toledo, in the district aforesaid, before the Honorable John Baxter, circuit judge for the sixth circuit, on the 29th day of September, being a day of the June term, in the year of our Lord one thousand eight hundred and eighty-three, and in the one hundred and eighth year of the Independence of the United States of America.

AUGUSTUS J. RICKS, *Clerk.*

2 On the 19th day of March, A. D. 1880, being a day of the December term of said court, there was filed in this cause the following bill of complaint, viz:

Bill of Complaint.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division. In Chancery.

J. F. D. LANIER, CHARLES LANIER, JOHN W. ELLIS, EDWARD D. Adams, Edward Winslow, and Daniel B. Safford, Partners under the Firm Name of Winslow, Lanier and Company, Complainants,

against

JOHN NASH, ELLEN NASH, EDWARD PURCELL, WILLIAM H. WEST, James Walker, William A. West, James Kernan, James Kernan, Jr., Mariah Marquis, and Elmira Marquis, Partners under the Firm Name of M. & E. Marquis; William Goodrich, Dennis Madigan, and A. E. Burkhardt and Company, Defendants.

To the judges of the circuit court of the United States for the northern district of Ohio:

3 J. F. D. Lanier, Charles Lanier, John W. Ellis, Edward D. Adams, Edward Winslow, and Daniel B. Safford, copartners doing business in the city of New York, and citizens of the State of New York, bring this their bill against John Nash, Ellen Nash, Edward Purcell, William H. West, James Walker, William A. West, James Kernan, James Kernan, Jr., Mariah Marquis, and Elmira Marquis, copartners under the firm name of M. & E. Marquis; William Goodrich, Dennis Madigan, and A. E. Buckhardt and Company, an association of persons doing business in the State of Ohio, the individual names of which persons are unknown to your orators, each and all citizens of the State of Ohio, and whom your orators pray may be made defendants to this their bill; and thereupon your orators complain and say:

That on or about the 4th day of December, 1876, the said John Nash and Ellen Nash executed and delivered a mortgage to one Hugh Colville, his heirs and assigns, in fee-simple upon the following lands, situate in the county of Logan and State of Ohio, and within the western division of the northern district of said State, to wit: Lot No. one (1), as surveyed by A. A. Harbison, county surveyor, on the 25th and 26th days of July, 1845, beginning at a stone in

the West Liberty road, corner sections 21, 22, 27, and 28; thence east with the north line of sec. 21 320 poles to the corner of sec-. 21 and 15; thence in continuation of said line 66 poles, making in all 386 poles, to a pile of stone in dry channel of creek, crossing Otter creek at 42 poles and Urbana and Zanesfield road at 252 poles; thence south 63½ west 121 poles to a stone in edge of the Prairie, 129 links S. to 62 W. from a burr oak, crossing Mackacheek 4 creek several times; thence south 1¼° west 48 poles 7 links to a stone on bank of creek, crossing creek at 8½ and 12 poles; thence south 31° west 32 poles 9 links to a stone, crossing creek at 1½ and 6½ poles; thence west 262.5 poles to a stone in west line of sec. 21; thence with said line north 130 poles 7 links, its beginning, containing two hundred [and] forty-four acres and $\frac{15}{100}$ of an acre. South part of section No. 16, T. 5, R. 13, M. R. S., as follows: Beginning at S. W. corner of said section at a post in a pra-rie; thence N. 2° E. 126 poles to a stone, Venita R. Runkle's southwest corner; thence north 88½° east 101.2 poles along said Runkle's south line to a stone in the Ludlow line; thence south 18° east along said Ludlow line to the southeast corner of said section; thence south 88½° west 140.4 poles to the place of beginning, containing ninety-six acres, more or less, reserving and excepting out of the above-described ninety-six acres 11 acres now owned by A. Sanders Piatt, beginning at two jack oaks, southeast corner of said section 16, in Ludlow's line; thence west 77 poles to the centre of the county road; thence north with the centre of said road 73¼° east 73 poles to a stone in the Ludlow line; thence with said Ludlow line south 20° east 14 poles, crossing the old channel of Mackacheek creek at 8 poles, its beginning, the amount hereby intended to convey being three hundred and twenty-nine acres, more or less. Also another lot of land in said county, beginning at a stake corner between sec-. 15, 16, 21, and 22, in a pra-rie; thence with the line of sec. 22 west 6 chains and 75 links to a burr oak 5 inches 5 in diameter; thence north 52° east 28 links; thence N. 55½° E. 8 chains and 32 links to a wild cherry, 6 inches in diameter; thence N. 27½° E. 32 links in the line between sec-. 22 and 16; thence with said line S. 4 chains and 78 links to the beginning, containing one acre and $\frac{61}{100}$ of an acre of land, being part of the S. E. quarter of sec. No. 22, town. 5, range 13, and being same premises conveyed by John A. O. Runkle and Anna L. Runkle, his wife, to Ellen Nash by deed recorded in book 38, page 478, in the recorder's office of Logan county.

Also the following-described real estate, to wit, all that certain tract of land in the county of Logan and State of Ohio, and in the Congress district, so-called, bounded and described as follows, being fractional section No. seventeen and part of fractional section No. twenty-three of town. five of range thirteen in Logan county, Ohio: Beginning at the southeast corner of said section No. seventeen at a post in Ludlow's line; thence with said line N. 18¾° W. 236.6 poles to a point in the river 8 feet east of the northeast corner of the bridge; thence down the river on the northwest side thereof, at the water's edge, to a post, from which the said corner at the bridge bears

N. 48° E. 85 poles; thence S. 18° E. 9.5 poles, crossing the river twice, cutting off a large bend, to a post; thence continuing down the river, as before, to a post in the line of John Kelly's land at the mouth of a spring branch; thence S. 1° W. 36 poles, running in the river from one to eighteen poles and crossing it at 34 poles,
6 to a post — corner to said John Kelly's, from which a willow 5 inches diameter, marked with two transverse cuts near the root, bears S. 61¾° E. 123 links; thence S. 10½° E. 96.3 poles, crossing the river at 11 poles to a post in the south line of said section No. 23; thence S. 89° E. 141.10 poles to the place of beginning, containing one hundred and forty-one acres and seventy-seven hundredths of an acre (141.77), be the same more or less, except about one acre on the east side of the road now traveled, called the Ludlow road, and subject to the reservation contained in a deed from Charles Moots and wife to John Nash, in book 43, pages 291–2, of the recorder's office in said county.

Also that certain other tract of land in said county of Logan and State of Ohio, being part of section No. 23, town. five, range thirteen, M. R. S., beginning at a post in the south line of said section, southwest corner, to lands once belonging to Charles Moots; thence north 88½° W. 59.4 poles to a post; thence N. 7½° W. 79.7 poles, crossing Mad river to a post; thence N. 87½° E. 56.4 poles, crossing Mad river to a post, from which an elm tree six inches in diameter bears south 10° east 73 links; thence south 10° east 104 poles, crossing Mad river twice, to the place of beginning, containing thirty-two acres and thirty-seven hundredths of an acre (32.37 acre-).

Also that certain other tract of land in said Logan county and State of Ohio, being the north part of section 16, town. 5,
7 range 13, M. R. S., as surveyed by O. Hays on the 28th day of July 16, 1862, beginning at a stone, original northwest corner to said section; thence S. 2° W. 198.2 poles to a stone in the west line of said section; thence N. 88½° E. 101.2 poles to a stone in the Ludlow line; thence N. 18° W. with the present bearing of said Ludlow line 211 poles to a stone in said line, original N. E. corner of said section, from which a black oak 16 inches in diameter bears N. 77½° W. 19 links, and thence S. 88½° W. 28 poles to the place of beginning, containing eighty acres, more or less; all said premises being the same conveyed by William L. Avery to Ellen Nash by deed recorded in book 48, pages 342–3, in recorder's office of Logan county, and all the estate, title, and interest of the said John Nash and Ellen Nash, his wife, either in law or equity, of, in, and to the said premises, together with all the privileges and appurtenances to the same belonging, and all the rents, issues, and profits thereof. Said mortgage, bearing the date aforesaid, was executed as aforesaid in order to secure the payment unto the said Hugh Colville or his order the sum of thirteen thousand dollars by the said John Nash, with interest from the 4th day of December, 1876, at the rate of eight per centum per annum, payable semi-annually, and payable at the Commercial Bank of Cincinnati, Ohio, on the 7th day of December, 1879, according to a promissory note dated December 4th,

1876, which fell due on the 7th day of December, 1879, and which is described in said mortgage deed.

8 Your orators further represent that said mortgage was, on the 11th day of December, 1876, at 3 o'clock p. m., delivered to the recorder of said county of Logan, to be by him placed on record, and was recorded on the 12th day of December, 1876, in the records of said Logan county, Ohio, in volume 2, pages 106, 107, and 108.

Your orators further represent that before the maturity of said promissory note the same and all the right, title, and interest of said Hugh Colville in and to the mortgage above specified securing the same were transferred and sold to your orators, who are now the owners and holders of said note and mortgage.

Your orators further represent that said sum of thirteen thousand dollars and interest, as specified in said promissory note, has not been paid to your orators, nor any part or portion thereof, although the same was long since due and payable, and the estate of your orators in said lands has become absolute at law. The said sum of thirteen thousand dolars, with interest thereon from the 4th day of December, 1876, at the rate of 8 per centum per annum, payable semi-annually, is now due your orators from the said John Nash on the security of said lands.

Your orators further represent that they have frequently and in a friendly manner applied to the said John Nash and requested him to pay the aforesaid indebtedness, which he has hitherto and does still refuse to do.

9 Your orator further represents that the defendants, Edward Purcell, William H. West, James Walker, William A. West, James Kernan, James Kernan, Jr., Mariah Marquis, and Elmira Marquis, who are partners doing business under the firm name of M. & E. Marquis; William Goodrich, Dennis Madigan, and A. E. Burkhardt and Company, have, or claim to have, some interest in or liens upon the lands above described, and your orators pray that they may answer herein, setting forth such claims, if any, or be forever barred from asserting any interest in or claim upon said lands; and your orators aver that whatever claims said defendants may have upon said lands are subject and subordinate to the interest of your orators therein on account of the mortgage above set forth.

Your orators therefore pray for process of subpœna against the said John Nash, Ellen Nash, Edward Purcell, William H. West, James Walker, William A. West, James Kernan, James Kernan, Jr., Mariah Marquis, Elmira Marquis, William Goodrich, Dennis Madigan, and A. E. Burkhardt and Company, and that they may full, true, direct, and perfect answer make to all and singular the matters aforesaid; that an account may be taken under the direction and decree of this honorable court of what is due to your orators upon the said indebtedness; that said John Nash may be decreed to pay unto your orators what shall thus appear to be due, with the costs of this suit, by a short day to be appointed by the court, your orators being ready and willing and hereby offering, on being paid

10 their said debt and interest and costs, at such appointed time

to reconvey said lands to the said John Nash and Ellen Nash as this honorable court shall direct, and that in default of such payment the said lands may be sold and the proceeds applied to the payment of the amount which may be found due your orators as aforesaid, and that they may have such other and further relief in the premises as to your honors shall seem meet; and your orators shall ever pray, &c.

R. P. RANNEY,
Solicitor for Complainants.

And afterwards, to wit, on the 24th day of March, A. D. 1880, the following subpœna was issued in this cause, being in the words and figures as follows, viz:

THE UNITED STATES OF AMERICA, }
Northern District of Ohio, Western Division, } *ss:*

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to summon John Nash, Ellen Nash, Edward Purcell, William H. West, James Walker, William A. West, James Kernan, James Kernan, Jr., Mariah Marquis and Elmira Marquis, partners under the firm name of M. & E. Marquis; William Goodrich, Dennis Madigan, and A. E. Burkhardt and Company, if they be found in your district, to be and appear in the circuit court of the United States within and for the district aforesaid, at
11 Toledo, on the first Monday in May next, to answer a certain bill in chancery filed and exhibited in said court against them by J. F. D. Lanier, Charles Lanier, John W. Ellis, Edward D. Adams, Edward Winslow, and Daniel P. Safford, partners under the firm name of Winslow, Lanier and Company. Hereof they are not to fail, under the penalty of the law thence ensuing; and have you then and there this writ.

Witness the Honorable Morrison R. Waite, chief justice of the United States, this 19th day of March, A. D. 1880, and in the 104th year of the Independence of the United States of America.

[SEAL.]

A. J. RICKS, *Clerk,*
By E. W. PAGE,
Deputy Clerk.

MEMORANDUM.—The said defendants are required to enter their appearance in this suit, in the clerk's office of said court, on or before the first Monday in May, 1880; otherwise the said bill may be taken *pro confesso.*

A. J. RICKS, *Clerk.*

Service of the above summons acknowledged this 22nd day of March, 1880.

WEST, WALKER & WEST,
Att'ys for A. E. Burkhardt & Co.

NORTHERN DISTRICT OF OHIO, *ss:*

On the 22nd day of March, 1880, I made due service of this writ at Logan county, Ohio, as follows, to wit: By delivering a true copy of this writ, duly certified, to each of the following within-named persons, John Nash, Ellen Nash, and William Goodrich, and
12 by leaving a true copy, duly certified, at the usual place of abode of each of the within-named, Mariah Marquis and Elvina Marquis, partners under the firm name of M. & E. Marquis, in the hands of their mother, Elizabeth Marquis, the said Mariah and Elvina Marquis being absent from home; all at Monroe township. On same day I delivered a true copy of this writ, duly certified, to the within-named Dennis Madigan at Zam township. I also, same day, delivered a true copy of this writ, duly certified, to each of the following within-named persons, to wit: William H. West, James Walker, William A. West, James Kernan, and James Kernan, Jr., at Bellefontaine. I also, same day and place, delivered a true copy of this writ, duly certified, to West, Walker, & West, attorn*ies* for the within-named E. A. Burkhardt and Company. (See service accepted on this writ.) The within-named Ed. Purcell not found; neither has he a residence in this district.

W. F. GOODSPEED,
U. S. Marshal,
By JOHN ODELL, *Deputy.*

Endorsed: Returnable May 3rd, 1880. Rule day for appearance, May 3rd, 1880; rule day for answer, June 7th, 1880. Returned and filed March 24th, 1880. Clarance Brown, dep. clerk.

And afterward, to wit, on the 1st day of May, A. D. 1880,
13 the answer of Ellen Nash was filed in this cause in this court, being in the words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

J. F. D. LANIER, CHARLES LANIER, JOHN W. ELLIS, EDWARD D. Adams, Edward Winslow, and Daniel B. Safford, Partners under the Firm Name of Winslow, Lanier and Company, Complainants,
against
JOHN NASH, ELLEN NASH, EDWARD PURCELL, WILLIAM H. WEST, James Walker, William A. West, James Kernan, James Kernan, Jr., Mariah Marquis and Elmira Marquis, Partners under the firm name of M. & E. Marquis; William Goodrick, Dennis Madigan, and A. E. Burkhardt & Co., Defendants.

The defendants, John Nash and Ellen Nash, his wife, answering separately for and on behalf of the said Ellen Nash, shew the following defenses to the complainants' bill of complaint filed against them and others, to wit:

1. They admit the making of the note and mortgage in the bill mentioned, but say that the same, together with a certain other

note for the sum of seven thousand dollars, secured by the
14 mortgage deed of these defendants of the same date on number three hundred and seventy-seven West Eighth street, Cincinnati, Ohio, then the sole and separate property of the said Ellen Nash, were made and executed to the said Hugh Colbville, who was then the cashier of the Commercial Bank of Cincinnati, Ohio, to be by him held as collateral security for a loan or loans of thirteen thousand dollars, obtained at or about the same time from the said Commercial Bank by the said John Nash and others, as John Nash and Company, on their promissory notes to the said bank for twelve thousand dollars and one thousand dollars, payable in a short day thereafter. These defendants further say that the said note and mortgage in the complainants' bill sued and said mortgage for seven thousand dollars were founded on no other consideration than said loan of thirteen thousand dollars from said Commercial Bank, and were made to said Colville upon no other consideration and for no other purpose than to be by him held as collateral security for the payment of said loan.

2. These defendants further say that while said two notes and mortgages were so held by the said Hugh Colville proceedings were instituted in the proper court in Hamilton county, Ohio, against these defendants for the foreclosure of said seven-thousand-dollar mortgage and for the sale of said mortgaged premises number three hundred and seventy-seven West Eighth street, Cincinnati, Ohio,
under which said premises were brought to sale, and from the
15 net proceeds, after payment of costs, six thousand four hundred and thirty-two dollars and seventy-two cents were by said court in Hamilton county, Ohio, ordered to be applied in discharge of the interest then, to wit, November 20, 1879, due to said bank on said loan, and the balance to be credited on the principal of said loan as of that date, which was done.

3. These defendants deny that there is due to said complainants the said sum of $13,000.00, with interest, as alleged in their said bill, and say that if any sum is due to said complainants on said note and mortgage in their bill sued, such sum does not exceed the balance which on the 20th day of November, 1879, remained due to said bank on said loan after the application of said sum of $6,432.72 as aforesaid and proper interest thereon.

4. These defendants further say that they have no knowledge or means of knowing that said complainants are the owners or holders of said note and mortgage in their bill sued, or that the same were assigned or transferred to them before maturity, and deny the same. They further say that said complainants took said note and mortgage charged with notice of the equities and defenses aforesaid existing against the same in favor of the said Ellen Nash and after said note had become and was dishonored, of which fact complainants then also had notice.

These defendents, therefore, pray that an account be taken of the amount which on the 20th day of November, 1879, remained due
to said Commercial Bank on the loan aforesaid after the appli-
16 cation of said sum of $6,432.72, and that said complainants in no event have decree for any greater sum than the amount

of such balance with proper interest thereon, and that complainants be required to answer severally under oath the interrogatories propounded to them and hereto annexed.

WILLIAM H. WEST AND
JAMES KERNAN,
Solicitors for John Nash and Ellen Nash.

THE STATE OF OHIO, }
Logan County, } *ss:*

Ellen Nash, being sworn, says that all the matters set forth in the foregoing answer of herself and John Nash are true, as she verily believes.

NELLIE NASH.

Sworn to before me and in my presence subscribed this 28th day of April, 1880, by Ellen Nash.

GEO. H. ALLEN,
Clerk Logan Com. Pleas.

The following interrogatories are propounded to the complainants, to be by them severally answered under oath, as required by said Ellen Nash in her answer above set forth:

First. The complainants will severally state if they or either of them be the owner or holder of the note and mortgage for thirteen thousand dollars in their bill of complaint sued.

Second. The complainants will severally state upon what consideration the said note and mortgage *was* transferred or assigned to them.

17 Third. The complainants will severally state upon what day and year the said note and mortgage for $13,000 ceased to be the property of the said Commercial Bank of Cincinnati, Ohio, and ceased to be held by the said Hugh Colville and were assigned to the complainants or either of them.

JAMES KERNAN & WILLIAM H. WEST,
Solicitors for John Nash & Ellen Nash.

And also on the 1st day of May, A. D. 1880, the answer of John Nash was filed in this cause in this court, being in the words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

J. F. D. LANIER, CHARLES LANIER, JOHN W. ELLIS, EDWARD D. ADAMS, Edward Winslow, and Daniel B. Safford, Partners under the Firm Name of Winslow, Lanier & Company, Complainants,

against

JOHN NASH, ELLEN NASH, EDWARD PURCELL, WILLIAM H. WEST, James Walker, William A. West, James Kernan, James Kernan, Jr., Mariah Marquis and Elmira Marquis, Partners under the Firm Name of M. & E. Marquis; William Goodrich, Dennis Madigan, and A. E. Burkhardt and Company, Defendants.

18 The defendant, John Nash, answering separately on his

own behalf, shews the following defenses to the complainants' bill of complaint filed against him and others, to wit:

1. He admits the making of the note and mortgage in the bill mentioned, but says that the same, together with a certain other note for the sum of seven thousand dollars, secured by the mortgage deed of this defendant and the defendant Ellen Nash, of the same date, on number three hundred and seventy-seven West Eighth street, Cincinnati, Ohio, then the sole and separate property of the said Ellen Nash, wife of this defendant, were made and executed to the said Hugh Colville, who was the cashier of the Commercial Bank of Cincinnati, Ohio, to be by him held as collateral security for a loan or loans of thirteen thousand dollars, obtained at or about the same time from the said Commercial Bank by this defendant and others, as John Nash and Company, on their promissory notes to said bank for twelve thousand dollars and one thousand dollars, payable in a short day thereafter.

This defendant further says that the said note and mortgage in complainants' bill sued and said mortgage for seven thousand dollars were founded on no other consideration than said loan of thirteen thousand dollars from said Commercial Bank, and were made to said Colville upon no other consideration and for no other purpose than to be by him held as collateral security for the re-
19 payment of said loan.

2. This defendant further says that while said two notes and mortgages were so held by the said Hugh Colville proceedings were instituted in the proper court in Hamilton county, Ohio, against this defendant and the said defendant Ellen Nash for the foreclosure of said seven-thousand-dollar mortgage and for the sale of said mortgaged premises number three hundred and seventy-seven West Eighth street, Cincinnati, Ohio, under which said premises were brought to sale, and from the net proceeds, after payment of costs, six thousand four hundred and thirty-two dollars and seventy-two cents were by said court in Hamilton county, Ohio, ordered to be applied in discharge of the interest then, to wit, November 20, 1879, due to said bank on said loan, and the balance to be credited on the principal of said loan as of that date, which was done.

3. This defendant denies that there is due to said complainants the said sum of $13,000.00, with interest, as alleged in their said bill, and say that if any sum is due to said complainants on said note and mortgage in their bill sued, such sum does not exceed the balance which on the 20th day of December, 1879, remained due to said bank on said loan after the application of said sum of $6,432.72, as aforesaid, and proper interest thereon.

4. This defendant further says that he has no knowledge or means of knowing that said complainants are the owners or holders of said note and mortgage in their bill sued, or that the same were assigned or transferred to them before maturity, and deny
20 the same. He further says that said complainants took said note and mortgage charged with notice of the equities and defenses aforesaid existing against the same, and after said note be-

came — and was dishonored, of which facts complainants then also had notice.

This defendant, therefore, prays that an account be taken of the amount which on the 20th of November, 1879, remained due to said Commercial Bank on the loan aforesaid after the application of said sum of $6,432.72, and that said complainants in no event have decree for any greater sum than the amount of such balance, with proper interest thereon, and that complainants be required to answer severally under oath the interrogatories propounded to them and annexed to the answer of defendant Ellen Nash.

WILLIAM H. WEST AND
JAMES KERNAN, JR.,
Solicitors for Defendant, John Nash.

THE STATE OF OHIO, } ss:
Logan County, }

John Nash, being sworn, says that all the matters and things set forth in his foregoing answer are true, as he verily believes.

JOHN NASH.

Sworn to before me and in my presence subscribed by John Nash this 28th day of April, 1880.

GEO. H. ALLEN,
Clerk Logan Common Pleas.

21 And also on the 1st day of May, A. D. 1880, there was filed in this cause in this court the answer of William H. West *et al.*, being in the words and figures following, to wit:

Answer and Cross-Petition of William H. West et al.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division. In Chancery.

J. F. D. LANIER, CHARLES LANIER, JOHN W. ELLIS, EDWARD D. Adams, Edward Winslow, and Daniel B. Safford, Partners under the Firm Name of *of* Winslow, Lanier & Company, Complainants,
against
JOHN NASH, ELLEN NASH, EDWARD PURCELL, WILLIAM H. WEST, James Walker, William A. West, James Kernan, James Kernan, Jr., *et al.*, Defendants.

The defendants, William H. West, James Walker, William A. West, James Kernan, and James Kernan, Jr., answering to the complainants' bill, say:

That on the 10th day of November, A. D. 1879, the defendants, John Nash and Ellen Nash, his wife, were indebted to the said William H. West, James Walker, and William A. West in
22 the sum of three hundred dollars ($300.00), which said indebtedness was evidenced by their promissory note of that date, a true copy of which is as follows:

$300.00.

On or before the 1st day of May, 1881, for value received, we, or

either of us, promise to pay to the order of William H. West, James Walker, and William A. West the sum of three hundred dollars, with interest at the rate of six per cent. per annum from date until paid.

November 10th, 1879.

JOHN NASH.
NELLIE NASH.

2. There are no credits or indorsements on said note.

3. These defendants further say that on the said 10th day of November, A. D. 1879, the said defendants, John Nash and Ellen Nash, his wife, were also indebted to the said James Kernan and James Kernan, Jr., in the sum of six hundred dollars ($600.00), which indebtedness was evidenced by their two other promissory notes of that date, a true copy of which notes is as follows:

$300.00.

On or before the 1st day of May, 1881, for value received, we or either of us promise to pay to the order of James Kernan and James Kernan, Jr., the sum of three hundred dollars with interest at the rate of six per cent. per annum from date until paid.

November 10th, 1879.

JOHN NASH.
NELLIE NASH.

23 $300.00

On or before the 1st day of May, 1881, for value received, we, or either of us, promise to pay to the order of James Kernan and James Kernan, Jr., the sum of three hundred dollars, with interest at the rate of six per cent. per annum from date until paid.

November 10th, 1879.

JOHN NASH.
NELLIE NASH.

4. On the 10th day of November, A. D. 1879, in order to secure the payment of the three several promissory notes above set forth according to their tenor and effect, the said John Nash and Ellen Nash, his wife, who signs her name as Nellie Nash, made, executed, and delivered to the said defendants, William H. West, James Walker, William A. West, James Kernan, and James Kernan, Jr., their mortgage deed of that date and thereby conveyed to them and their heirs and assigns forever the mortgage premises in the complainants' bill particularly described.

5. Said mortgage deed contained therein a condition of defeasance substantially as follows: That if the said John Nash and Ellen Nash shall well and truly pay said notes when the same shall become due with interest according to their tenor and effect then said presents shall be void.

6. On the 10th day of November, A. D. 1879, at 6½ o'clock p. m., said mortgage deed was duly delivered to the recorder of Logan county, Ohio, to be by him recorded in the mortgage records of said county, which on the 12th day of November, 1879, was accordingly done.

24 7. These answering defendants, therefore, pray this honorable court that an account may be taken of the several amounts to become due to them on the security of said notes and mortgage, and that out of the proceeds of any sale of said mortgage premises the said notes and interest may be ordered to be paid, and for other proper relief.

WEST, WALKER AND WEST AND
KERNAN AND KERNAN
Attorneys for the said Defendants.

STATE OF OHIO, } *ss:*
Logan County, }

William A. West, being first duly sworn, says that he is one of the answering defendants named in this their answer and cross-petition and that he believes the statements therein contained are true.

WM. A. WEST.

Sworn to and subscribed by the said William A. West before me and in my presence this 27th day of April, A. D. 1880.

GEO. H. ALLEN,
Clerk Logan County, Ohio, Common Pleas.

And afterwards, to wit, on the 12th day of May, A. D. 1880, there was filed in this cause in this court the answer of M. and E. Marquis, being in the words and figures following, to wit:

25 *Action in Chancery to Foreclose Mortgage on Real Estate and Marshal Liens.*

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

J. F. LANIER, CHARLES LANIER, JOHN W. ELLIS, EDWARD D. ADAMS, Edward Winslow, and Daniel B. Safford, Partners under the Firm Name of Winslow, Lanier and Company, Complainants,

against

JOHN NASH, ELLEN NASH, EDWARD PURCELL, WILLIAM H. WEST, James Walker, William A. West, James Kernan, James Kernan, Jr., Maria Marquis and Elvina Marquis, Partners under the firm name of M. & E. Marquis; William Goodrich, Dennis Madigan, and A. E. Burkhardt and Company, Defendants.

The defendants, Maria Marquis and Elvina Marquis, say they are partners doing business as M. & E. Marquis, and for answer to plaintiffs' bill and for cross-bill against their codefendants say:

1. By the consideration of the district court within and for Logan county and State of Ohio, at the March term, A. D. 1880, thereof, to wit, on the 25th day of March, A. D. 1880, and by consent of
26 said Ellen Nash, they recovered a finding, judgment, order, and decree against the defendant, Ellen Nash, for the sum of eighty dollars debt and ninety and $\frac{85}{100}$ dollars costs of suit, and a

finding and decree that the same was a charge and lien on said real estate described in plaintiffs' bill in this action, and an order that if said Ellen Nash failed to pay said sum and interest thereon and costs within — short day that said real estate or sufficient thereof to pay the same should be sold and the proceeds of sale applied to the payment thereof and increase- costs.

2. Said finding, judgment, order, and decree remain in full force and effect, and no part of the same has been paid, and these answering defendants are still the owners of said claim, and there is justly due to them from said Ellen Nash thereon said sum of eighty dollars, with interest thereon from the 25th day of March, A. D. 1880, and said sum of $90.85 costs.

3. These defendants say their said claim was and is against said Ellen Nash, as a married woman, and their said action in which they recovered their said judgment and decree was an action to charge the separate estate of said Ellen Nash, and then pleading in their said action in which they described the real estate described in the bill in this action was filed in the court of common pleas of said Logan county on the 14th day of April, A. D. 1877, and these defendants claim and aver that their said judgment and decree
27 attaches as a lien on said real estate on and from the said 14th day of April, A. D. 1877.

These defendants ask that account be taken, the priorities of lien determined, the said premises sold, and the proceeds of sale applied to the payment to them of said sum of $80.00 and interest thereon from the 25th day of March, 1880, and said sum of $90.85 of costs and for such other relief as in the premises they may be entitled to.

E. J. HOWENSTINE,
Solicitor for Maria and Elvina Marquis.

STATE OF OHIO, } ss:
Logan County, }

E. J. Howenstine, being sworn, says he is attorney, solicitor, and agent for Maria Marquis and Elvina Marquis, partners as M. & E. Marquis, duly authorized in the premises; that he has personal knowledge of the facts stated in the foregoing pleadings, and the said facts and the allegations of said pleading are true, as he believes.

E. J. HOWENSTINE.

Sworn to before me and signed in my presence by said E. J. Howenstine this 10th day of May, 1888.

JOHN O. SWEET,
Notary Public, Logan County, O.

And afterwards, to wit, on the 26th day of May, A. D. 1880, there was filed in this cause in this court the following entry of appearance and answer of Edward Purcell, being as follows, viz:

28 Circuit Court of the United States, Western Division of Northern District of Ohio.

J. F. D. LANIER *et al. vs.* JOHN NASH *et al.*

Now comes Edward Purcell, having been made a defendant herein, and hereby waives the issue and service of subpœna, and enters his voluntary appearance in this suit.

And this defendant for answer to the complaints' bill says he did, prior to the filing of said bill, assign and transfer to the defendants, Maurice Walsh and Johanna Mahon, the mortgage deed executed and delivered to him by John Nash and Ellen, his wife, upon the lands described in the bill and the note secured thereby, and has no interest whatever in said lands; and, therefore, he prays hence to be dismissed with his costs.

EDWARD PURCELL.

And afterwards, to wit, on the — day of June, A. D. 1880, being a day of the June term of said court, the following order was entered herein, viz:

On motion of Maurice Walsh and J. Mahon, and upon it being made to appear that they have an interest in the subject-matter of this action as assignees and holders of the mortgage made to said Edward Purcell upon the lands described in the said bill,
29 it is ordered that the complainants amend their bill by making them parties herein within ten days.

And afterwards, to wit, on the 5th day of June, A. D. 1880, it being a day of the June term thereof, the following amendment to bill was filed in this cause in this court, being as follows:

To the judges of the circuit court of the United States for the northern district of Ohio and western division thereof:

Your orators, J. F. D. Lanier, Charles Lanier, John W. Ellis, Edward D. Adams, Edward Winslow, and Daniel B. Safford, partners under the firm name of Winslow, Lanier and Company, citizens of the State of New York, represent that heretofore they have filed their bill of complaint in this court, which is now pending therein, against Edward Purcell and others, stating as therein stated and praying as therein prayed, and they further represent that they are now informed and believe that prior to the filing of said bill the said Edward Purcell had assigned such interest as he might have in the lands conveyed by the mortgage described in the bill to Maurice Walsh and Johanna Mahon, which interest, if any, is inferior and subject to the lien of said mortgage. Your orators, therefore, by leave of the court, file this amendment to their said bill and pray that the said Maurice Walsh and Johanna Mahon may be
30 made parties defendant thereto, and that they may answer the premises, and that upon the final hearing your orators may have the relief prayed for in their said bill; that the writ of subpœna may issue against the said Walsh and Mahon as provided by the rules and practice of this court.

R. P. RANNEY,
Sol. for Complainants.

And also on the 5th day of June, A. D. 1880, being a day of the June term of said court, there was filed in this cause the following answer of Maurice Walsh and Johanna Mahon, viz:

The Joint Answer of Maurice Walsh and Johanna Mahon.

United States Circuit Court, Northern District of Ohio, Western Division.

J. F. D. LANIER, CHARLES LANIER, JOHN W. ELLIS, EDWARD D. Adams, Edward Winslow, and Daniel B. Safford, Partners as Winslow, Lanier & Co., Complainants,

against

JOHN NASH, ELLEN NASH, EDWARD PURCELL, WILLIAM H. WEST, James Walker, William A. West, James Kernan, James Kernan, Jr., Mariah Marquis, Elmira Marquis, William Goodrich, Dennis Madigan, A. E. Burkhardt & Co., Maurice Walsh, and Johanna Mahon, Defendants.

31 The said Maurice Walsh and Johanna Mahon, lien holders as assignees of the mortgage made to Edward Purcell, made defendants herein, by leave of court first had and obtained, now come, and, for answer to the bill of complaint filed by the complainants, say that they believe it is true that the defendant Nash and wife, in December, 1876, executed and delivered the mortgage in the bill set forth, for the sum of thirteen thousand dollars, upon the lands in the petition described, and that said mortgage was recorded, as stated in the bill.

These defendants, further answering, say they have no knowledge of the transfer of said mortgage to the complainants by Hugh Colville, and therefore deny the same, and say they have been informed and believe the same was passed to the complainants by the Commercial Bank of Cincinnati.

These defendants, further answering, deny that there is thirteen thousand dollars due to the complainants upon said mortgage debt; and these defendants aver that at or about the time the said mortgage exhibited by the complainants was made and delivered by Nash to Colville another mortgage, for seven thousand dollars, upon a house and lot on 8th street, in Cincinnati, was made and delivered by Nash to Colville to secure the same debt; that the debt the two mortgages were given for was only twelve thousand dollars ($12,000), and that since that time the said seven-thousand-dollar mortgage has been foreclosed and paid, leaving now due upon the mortgage exhibited by complainants the sum of five thousand dollars and interest.

32 These defendants deny that there is interest due on said sum of thirteen thousand dollars from the 4th day of December, 1876, and they further aver that at the time the mortgage hereinafter referred to was made by Nash and wife to Edward Purcell and duly recorded there was at that time due on the mortgage held by complainants for $13,000 only $12,000, and since that time seven thousand dollars has been paid thereon.

These defendants say they have been informed and believe, and so state fact to be, that Hugh Colville was not the owner of the mortgage set forth in the bill; that the Commercial Bank of Cincinnati, of which Colville was cashier, was the owner of the same; that Colville had in fact no interest in the same. The bank had made loans to Nash prior to the giving of the mortgages upon collaterals still held by them. The mortgages, however, were a separate transaction. And these defendants further aver that all the moneys due on said $13,000 mortgage at the time the Purcell mortgage was made and recorded is not over $5,000, allowing the payment of $7,000, as they believe, and that the debt due from Nash to the bank, if any above that amount, was for moneys loaned on separate and other contracts prior and after the recording of the Purcell mortgage, and in equity not a lien upon the lands in the petition described as against the lien and equity of the Purcell mortgage.

These defendants, further answering, say that on the 1st
33 day of September, 1877, the said John Nash and Ellen Nash, signing herself "Nellie," executed and delivered their mortgage deed, thereby conveying to Edward Purcell in fee-simple the following lands, parcel of the lands in the bill described: all that certain tract of land in the county of Logan and State of Ohio, and in the Congress district, so-called, bounded and described as follows, being fractional section No. 17 and part of fractional section No. 23 of town. five of range thirteen in Logan county, Ohio: Beginning at the southeast corner of said section No. 17 at a post in Ludlow's line; thence with said line N. 18¾° W. 236.6 poles to a point in the river 8 feet east of the northeast corner of the bridge; thence down the river on the northwest side thereof, at the water's edge, to a post, from which the said corner at the bridge N. — 48° E. 85 poles; thence S. 18° E. 9.5 poles, crossing the river twice, cutting off a large bend, to a post; thence contai*n*ing down the river, as before, to a post in the line of John Kelly's land at the mouth of a spring branch; thence S. 1° W. 36 poles, running in the river from one to eighteen poles and crossing it at 34 poles, to a post — corner to said John Kelly's, from which a willow 5 inches diameter, marked with two transverse cuts near the root, bears S. 61¾° E. 123 links; thence S. 10½° E. 96.3 poles, crossing the river at 11 poles to a post in the south line of said section No. 23; thence S. 89° E. 141.10 poles to the place of beginning, containing one hundred and forty-one acres and seventy-seven hundredths of an acre (141.77), be the same more or less, except about one acre on the east side of the road now traveled, called the Ludlow road, and
34 subject to the reservations contained in a deed from Charles Moots and wife to John Nash, in book 43, pages 291–2, of the recorder's office in said county.

Also that certain other tract of land in said county of Logan and State of Ohio, being part of section No. 23, town. five, range 13, M. R. S., beginning at a post in the south line of said section, southwest corner, to land once belonging to Charles Moots; thence N. 88½° W. 59.4 poles to a post; thence N. 7½- W. 79.7 poles, crossing Mad river to a post; thence N. 87½° E. 56.4 poles, crossing Mad river to

a post, from which an elm tree six inches in diameter bears south 10° east 73 links; thence south 10° east 104 poles, crossing Mad river twice, to the place of beginning, containing thirty-two acres and thirty-seven hundredths of an acre (32.37 acres).

Also that certain other tract of land in said Logan county and State of Ohio, being the north part of section 16, town. 5, range 13, M. R. S., as surveyed by O. Hays on the 28th day of July 1862, beginning at a stone, original northwest corner to said section; thence S. 2° W. 198.2 poles to a stone in the west line of said section; thence N. 88½° E. 101.2 poles to a stone in the Ludlow line; thence N. 18° W. with the present bearing of said Ludlow line 211 poles to a stone in said line, original N. E. corner of said section, from which a black oak 16 inches in diameter bears N. 77½- W. 19 links, and thence south 88½° W. 28 poles to the place of beginning, containing 80 acres, more or less. The said mortgage deed so exe-

35 cuted by Nash and wife was made to secure the sum of $5,200 loaned by Purcell to Nash, to be paid according to the tenor and effect of a promissory note dated Sept. 1st, 1877, made by John Nash and Ellen Nash, signing her name "Nellie," being known and called Ellen and Nellie, for said sum of $5,200, payable two years after date to said Edward Purcell or order, with 7 % interest per annum, as described in said mortgage deed. Said John Nash and Ellen Nash failed to pay said note at maturity or since and the said mortgage has become absolute.

These defendants further state that on the 8th day of January, 1878, said mortgage was recorded in the recorder's office of Logan county, Ohio, vol. R, pages 17 & 18, and then became a lien upon said lands for the amount of the mortgage debt, viz., $5,200, in favor of the mortgagee, Edward Purcell, and his assigns. Afterwards, in November, 1878, the said Edward Purcell being indebted to these defendants for moneys deposited with him in a sum greater than five thousand dollars, he assigned and transferred the said note and mortgage and his rights and interest in the said mortgaged premises to these defendants, who are now the holders and owners of said mortgage claim, and there is now due thereon to these defendants from John Nash and Ellen Nash the sum of six thousand one hundred and seventy dollars, with interest from May 1st, 1880, at 7% per annum, and as a lien upon the lands herein described, which said sum, or any portion thereof, the said Nash has refused and neglected to pay.

36 These defendants, further answering, say that they believe the complainants are not the *bona fide* holders and owners of said mortgage debt, and they charge the fact to be that the complainants hold the same in trust for collection on account of the Commercial Bank of Cincinnati; that the complainants have paid nothing for the same, did not purchase the same of Hugh Colville, and that the Commercial Bank is the real owner of the same and a necessary party to this suit.

These defendants therefore pray that this their answer may be taken as a cross-bill against the complainants and John Nash and Ellen Nash; that the mortgage held by these defendants be foreclosed, the

lands sold, the liens marshalled, and that upon sale the order provide to sell in separate tracts, as described in the bill; that the complainants' mortgage, or what is due thereon, be paid out of proceeds of lands other than are covered by defendants' mortgage, for an account as to the various liens, and for all proper equitable relief in the premises.

MALLON & COFFEY,
Solicitors for Maurice Walsh and Johanna Mahon.

STATE OF OHIO, *Hamilton County,* } ss:

Maurice Walsh and Johann Mahon, being duly sworn, depose and say that all the several matters and things which are stated in the foregoing, their answer, as from the information of others they each believe to be true, and that all the other several matters
37 and things therein set forth are true in substance and in fact.

his
JOHANNA x MAHON.
mark.
MAURICE WALSH.

Subscribed and sworn to before me this 17th day of May, 1880.
EDWARD J. DEMPSEY,
Notary Public in & for Hamilton Co., O.

And afterwards, to wit, on the 24th day of November, A. D. 1880, there was filed in this cause the following answer to interrogatories, viz:

Answer to Interrogatories.

UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division:

In the Circuit Court. Chancery.

J. F. D. LANIER *et al. vs.* JOHN NASH *et al.*

And now come the said complainants and, in answer to the interrogatories filed with the answer of John and Helen Nash in this cause, severally upon their oaths say:

First. That they are jointly by their firm name stated in the bill the *bona fide* owners and holders of the note and mortgage for thirteen thousand dollars which the said bill is brought to enforce.

Second. The consideration paid by the said complainants for
38 the said note and mortgage at the time the same was transferred to them was the sum of thirteen thousand nine hundred eighty-five dollars and eighty-four cents ($13,985.84), which was paid in cash at the time of the transfer.

Third. The said note and mortgage ceased to be the property of the said Commercial Bank of Cincinnati or to be held by the said

Hugh Colville on the 14th day of November, A. D. 1879, and were assigned to the said complainants at that date.

CHARLES LANIER.
DANIEL B. SAFFORD.
JOHN W. ELLIS.
EDWARD D. ADAMS.
EDWARD WINSLOW.

STATE OF NEW YORK, }
City & County of New York, } *ss:*

Be it remembered that on this 15th day of November, A. D. 1880, before me, Chas. Edgar Mills, a duly authorized commissioner for the State of Ohio, in and for said county and State, and residing in said city and State, personally appeared Charles Lanier, Daniel B. Safford, John W. Ellis, Edward D. Adams, and Edward Winslow, the complainants within named, who each, respectively, being by me first duly sworn, on his oath does depose and say that *they* have read the foregoing answer and know- the contents thereof, and that the statements therein contained are true.

39 Given under my hand and official seal this 15th day of November, A. D. 1880.

[SEAL.] CHARLES EDGAR MILLS,
Commissioner for Ohio in New York,
115 *Broadway, New York City.*

Endorsed as follows: I allow this answer to be filed instanter. Welker. Nov. 24, '80.

And afterwards, to wit, on the 3rd day of July, A. D. 1880, being a day of the June term of said court, there was filed in this cause the following reply to answer of Maurice Walsh and Johanna Mahon, viz:

Replication.

UNITED STATES OF AMERICA,
Northern District of —, Western Division:

J. F. D. LANIER *et al.* }
vs. } In Chancery.
JOHN NASH *et al.* }

And now comes the said complainants and, saving to themselves all benefit of exception to the answer of Maurice Walsh and Johanna Mahon filed herein, nevertheless, for replication thereto, say that they will aver, maintain, and prove that the statements and allegations made in their said bill of complaint are true and correct, and that everything in said answer contained contrary thereto is incorrect and untrue; wherefore they pray as in and by their said bill is already prayed, and ask for the relief therein asked for.

R. P. RANNEY,
Sol. for Comp's.

40 And afterwards, to wit, on the 2nd day of June, A. D. 1880, there was filed in this cause in this court the following replication, viz:

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

J. F. D. LANIER, CHARLES LANIER, JOHN W. ELLIS, EDWARD D. Adams, Edward Winslow, & Daniel B. Safford, Partners under the Firm Name of Winslow, Lanier and Company, Complainants,

against

JOHN NASH, ELLEN NASH, EDWARD PURCELL, WILLIAM H. WEST, James Walker, William A. West, James Kernan, James Kernan, Jr., Maria Marquis & Elmira Marquis, Partners under the Firm Name of M. & E. Marquis; William Goodrich, Dennis Madigan, & A. E. Burkhardt & Co., Defendants.

The replication of J. F. D. Lanier, Charles Lanier, John W. Ellis, Edward D. Adams, Edward Winslow, and Daniel B. Safford, partners under the firm name of Winslow, Lanier and Company, complainants, to the answers of John Nash, Ellen Nash, William H. West, James Walker, William A. West, James Kernan,
41 James Kernan, Jr., and Maria Marquis and Elmira Marquis, partners under the firm name of M. & E. Marquis, defendants.

These repliants, saving and reserving unto themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiences of the said answers, for replication thereunto say that they will aver, maintain, and prove their said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answers of the said defendants are uncertain, untrue, and insufficient to be replied unto by these repliants without this, that any other matter or thing whatsoever in the said answers contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

R. P. RANNEY,
Solicitor for Complainants.

And afterwards, to wit, on the 7th day of July, A. D. 1881, there was filed in this cause, in the clerk's office, the following separate answer of William Goodrich, being in the words and figures, viz:

42 *Separate Answer of William Goodrich.*

Circuit Court of the United States for the Western Division of the Northern District of the State of Ohio.

J. F. D. LANIER *et al vs.* JOHN NASH *et al.*

The respondent, Wm. Goodrich, now comes, and for his separate answer to the bill of complaint herein filed against him and others says that he admits the execution and delivery by said John Nash and wife of the mortgage as herein alleged and which is herein set forth as having been transferred to and being held by complainants, but as he is without any information, save as the same is derived from said bill, as to whether the full sum of thirteen thousand dollars and interest, as in said said bill alleged, is due from said Nash and wife to complainants, he does not admit the same and demands of complainants full and direct proof in the premises.

And this respondent, by way of cross-bill, further says that heretofore, to wit, at the October term, A. D. 1880, in the court of common pleas of Logan county, Ohio, in a certain civil action therein pending, he recovered a judgment against the said respond-

43 ents, John Nash and Ellen Nash, his wife, in the sum of eight hundred dollars damages and costs in the further sum of one hundred forty-three and $\frac{85}{100}$ dollars, which said judgment and costs became and are a lien upon the premises in said bill described at and from the first day of said October term of said court, A. D. 1880, to wit, the 19th day of October, A. D. 1880, which said lien has ever since been and now is in full force and effect.

And this respondent further, by way of cross-bill, alleges that on said judgment so recovered he caused execution to be issued, and the same has been levied upon the said lands in the bill of complaint described, but no sale of said premises has been made or had under said execution.

That said John Nash and Ellen Nash have no goods and chattels or other lands and tenements out of which this respondent can make his said judgment and costs or any part thereof.

Wherefore this respondent prays that said John Nash and Ellen Nash and said complainants and each and all of the respondents herein may be required to make full, true, and direct answer unto each and all of the allegations in this cross-bill contained, and that they each be required, if any interest they have in said premises upon which this respondent has his lien aforesaid, to set forth

44 in due form such claim or interest or be forever barred of such claim, right, or interest, and also that an account may be taken of the amount due this respondent on account of said judgment and costs, and that all the liens upon said real estate may be marshalled, and that the same may be sold under the order of this court, and that out of the proceeds thereof this respondent's said judgment and costs may be paid in full, and for other and further relief.

LEE, BROWN & KINKADE,
Att'ys for Wm. Goodrich.

STATE OF OHIO, } ss:
Lucas County, W. D., N. D., O., }

Reynolds R. Kinkade, being first duly sworn, deposes and says that the facts stated in the foregoing answer and cross-bill are true, as he verily believes, and that he makes this affidavit because he is one of the attorneys of this respondent, Wm. Goodrich, herein, and said respondent is a non-resident of and now absent from Lucas county aforesaid.

REYNOLDS R. KINKADE.

Sworn to before me and subscribed in my presence this 7th day of June, A. D. 1881.

SYLVESTER LAMB,
Notary Public, Lucas County, Ohio.

45 And afterwards, to wit, on the 8th day of June, being a day of the June term, A. D. 1882, of said court, the Hon. Martin Welker, district judge, presiding, the following decree was entered, viz:

No. 163. In Chancery.

This day came the parties, and thereupon the said John Nash and Ellen Nash and the complainants and each and all of the other respondents having failed to demur or make answer unto the answer and cross-bill of the respondent, William Goodrich, herein filed on the seventh day of June, A. D. 1881, it is ordered by the court that the same be taken as true against them.

And thereupon, this cause having come on for further hearing on said answer and cross-bill of said William Goodrich and proofs and exhibits, and the court being fully advised find that the said Goodrich did recover against said John and Ellen Nash the said judgment in the court and in the amount in the said answer and cross-bill set forth, and there is now due to said Goodrich from said John and Ellen Nash thereon the sum of eight hundred forty-three and $\frac{85}{100}$ dollars and interest thereon since the 19th day of October, 1880, in the further sum of 82.17 dollars, making an aggregate of $926.02.

And the court does also further find that said judgment became, on said 19th day of October, A. D. 1880, and has ever since
46 been, and now is, a lien on the real estate in the original bill of the complainant described, and for full description of which reference is here made to said original bill.

Whereupon it is adjudged and decreed by the court that said real estate be appraised, advertised, and sold as upon execution by the marshal, Wilber F. Goodspeed, who is hereby appointed master for that purpose, and that he bring the proceeds of such sale into court to abide its further order.

It is also further ordered that an order of sale issue accordingly.

And the court hereby reserves all other questions herein for further hearing and adjudication.

And afterwards on the 17th day of June, it being a day of the

June term, A. D. 1883, of said court, the following order was entered, Hon. Martin Welker, district judge, presiding, viz:

In this cause it is ordered that the decree entered in favor of William Goodrich on Thursday, June 8th, be expunged.

And afterwards, to wit, on the 5th day of June, being a day of the June term, A. D. 1883, of said court, the following certified copy of mortgage deed was filed in this cause in this court, viz:

47 Note.—$300.00.

On or before the 1st day of May, 1881, for value received, we, or either of us,promise to pay to the order of William H. West, James Walker, and William A. West the sum of three hundred dollars, with interest at the rate of six per cent. per annum from date until paid.

November 10, 1879.

JOHN NASH.
NELLIE NASH.

Note.—$300.00.

On or before the first day of May, 1881, for value received, we, or either of us, promise to pay to the order of James Kernan and James Kernan, Jr., the sum of three hundred dollars, with interest at the rate of six per cent. per annum from date until paid.

November 10, 1879.

JOHN NASH.
NELLIE NASH.

Note.—$300.00.

On or before the 1st day of May, 1881, for value received, we, or either of us, promise to pay to the order of James Kernan and James Kernan, Jr., the sum of three hundred dollars, with interest at the rate of six per cent. per annum from date until paid.

November 10, 1879.

JOHN NASH.
NELLIE NASH.

Mortgage. John Nash to William H. West et al.

Know all men by these presents that John Nash and Ellen Nash, his wife, of the county of Logan and State of Ohio, in consideration of the sum of three hundred (300) dollars to them paid by
48 William H. West, James Walker, and William A. West, of the same place, the receipt whereof is hereby acknowledged, and consideration of the sum of six hundred (600) dollars to them paid by James Kernan and James Kernan, Jr., of the State and county aforesaid, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey to the said William H. West, James Walker, William A. West, James Kernan, and James Kernan, Jr., their heirs and assigns forever, the following real estate, situate in said county of Logan and State of Ohio, and bounded and described as follows, to wit: Lot No. 1 (one) as surveyed by A. A. Harbison, county surveyor, on the 25th and 26th days of July, 1845, beginning

at a stone in the West Liberty road, corner section 21, 22, 27, & 28; thence east with the north line of section 21 320 poles to the corner of sections 21 and 15; thence in continuation of said line 66 poles, making in all 386 poles, to a pile of stone in dry channel of creek crossing Otter creek at 42 poles, and Urbana and Zanesville road at 252 poles; thence south 63½- west 121 poles to a stone in edge of the prairie 129 links, S. to 62 W. from a burr oak, crossing Mackacheek creek several times; thence S. 1¼- W. 48 poles 7 links to a stone on bank of creek, crossing creek at 8½ and 12 poles; thence south 31° west 32 poles 9 links to a stone crossing creek at 1½ and 6½ poles; thence west 262.5 poles to a stone in the west line of section 21; thence with said north 130 poles 7 links to the place of beginning, containing two hundred and forty-four acres and $\frac{15}{100}$ of an acre. Also the following real estate situate in the State and county aforesaid and

49 bounded and described as follows, to wit: Being the south part of section No. 16, T. 5, R. 13, M. R. S.: Beginning at the S. W. corner of said section at a point in a prairie; thence N. 2° E. 126 poles to a stone, Venitia R. Runkle's southwest corner; thence north 88½- east 101.2 poles along said Runkle's south line to a stone in the Ludlow line; thence S. 18° east along said Ludlow line to the S. E. corner of said section; thence S. 88½- west 140.4 poles to the place of beginning, containing ninety-six acres, more or less, reserving and excepting out of the above-described ninety-six acres eleven acres now owned by A. Sanders Piatt, beginning at two jack oaks, S. E. corner of said section 16, in Ludlow's line; thence west 77 poles to the center of the county road; thence north with the center of said road 73¼- east 73 poles to a stone in the Ludlow line; thence with said Ludlow line S. 20° east 24 poles, crossing the old channel of Mackacheek creek at 8 poles, to the beginning.

Also the following real estate, situate in said State and county, and beginning at a stake, corner between secs. 15, 16, 21, & 22, in a prairie; thence with the line of section 22 west 6 chains and 75 links to a burr oak 5 inches in diameter; thence N. 52° east 28 links; thence N. 55½- E. 8 chains and 32 links to a wild cherry 6 inches in diameter; thence N. 27½- E. 32 links in the line between sects. 22 and 16; thence with said line S. 4 chains and 78 links to the beginning, containing one acre and $\frac{61}{100}$ of an acre of land, being part of S. E. quarter of section No. 22, town. 5, range 13, and being same premises conveyed [by] John A. O. Runkle and Anna S. Runkle, his wife, to Ellen Nash by deed recorded in book 38, page 478, in the recorder's office of said county.

Also the following-described real estate, to wit, all that cer-

50 tain tract of land in the county of Logan and State of Ohio, and in the Congress district, so called, and bounded and described as follows, being fractional section No. seventeen and part of fractional section No. twenty-three of town. 5, range 13, in said county and State: Beginning at the southeast corner of section No. seventeen at a post in Ludlow's line; thence with said line N. 18¾- W. 236.6 poles to a point in the river 8 feet east of the northeast corner of the bridge; thence down the river on the northwest side thereof, at the water's edge, to a post, from which the said corner of the bridge

bears N. 48° E. 85 poles; thence S. 18- E. 9.5 poles, crossing the river twice, cutting off a large bend, to a post; thence continuing down the river, as before, to a post in the line of John Kelly's land at the mouth of a spring branch; thence S. 1° W. 36 poles, running in the river from one to eighteen poles and crossing it at 34 poles, to a post — corner to said John Kelly's, from which a willow 5 inches diameter, marked with two transverse cuts near the root, bears S. 61¾- E. 123 links; thence S. 10½- E. 96.3 poles, crossing the river at 11 poles to a post in the south line of said section No. 23; thence S. 89- E. 141.10 poles to the place of beginning, containing one hundred and forty-one acres and seventy-seven hundredths (141.77) of an acre, be the same more or less, except about one acre on the east side of the road now traveled, called the Ludlow road, and subject to the reservation contained in a deed from Charles Moots and wife to John Nash, recorded in book 43, page 291–2, in the recorder's office in said county.

Also that certain other tract of land in said county of Logan
51 and State of Ohio, being part of section No. twenty-three (23), town. 5, range 13, M. R. S., beginning at a post in the south line of said section, S. W. corner to lands once belonging to Charles Moots; thence N. 88½ W. 59.4 poles to a post; thence N. 7½- W. 79.7 poles, crossing Mad river, to a post; thence N. 7½- E. 56.4 poles, crossing Mad river, to a post from which an elm tree six inches in diameter bears S. 10° east 73 links; thence S. 10- E. 104 poles, crossing Mad river twice, to the place of beginning, containing thirty-two acres and thirty-seven hundredths of an acre (32.37).

Also that certain other tract of land in said county and State, being the north part of section 16, town. 5, range 13, M. R. S., surveyed by O. Hayes on the 28th of July, 1862. Beginning at a stone, original northwest corner to said section; thence S. 2- W. 198.2 poles to a stone in the west line of said section; thence N. 88½- E. 101.2 poles to a stone in the Ludlow line; thence N. 18° W. with the present bearing of said Ludlow line 211 poles to a stone in said line, original N. E. corner of said section, from which a black oak 16 in. in diameter bears N. 77½- W. 19 links, and thence S. 88½- W. 28 poles to the place of beginning, containing eighty acres more or less, all of said premises being the same conveyed by William L. Avery to Ellen Nash by deed recorded in book 48, pages 342–3, in the recorder's office of Logan county, Ohio, and all the estate, title, and interest of the said John Nash and Ellen Nash, his wife, either in law or in equity, of, in, and to said premises, together with all the privileges and appurtenances to the same belonging, and all the rents, issues, and profits thereof.

To have and to hold the same to the only proper use of
52 the said William H. West, James Walker, William A. West, James Kernan, and James Kernan, Jr., their heirs and assigns, forever; and the said John Nash and Ellen Nash, his wife, for themselves, and for their heirs, executors, and administrators, do hereby covenant with the said William H. West, James Walker, William A. West, James Kernan, and James Kernan, Jr., their heirs and assigns, that the said Ellen Nash is the true and lawful owner

of the said premises, and has full power to convey the same, and that the title so conveyed is clear, free, and unencumbered, and further that they will warrant and defend the same against all claim or claims of all persons whomsoever:

Provided, nevertheless, That whereas the said John Nash and Ellen Nash, his wife, are indebted to the said William H. West, James Walker, [and] William A. West in the sum of $300.00, evidenced by one promissory note of even date herewith, becoming due and payable on or before the 1st day of May, 1881, with interest thereon at the rate of six per cent. per annum from date until paid; and whereas also the said John Nash and Ellen Nash, his wife, are indebted to the said James Kernan and James Kernan, Jr., in the sum of $600.00, evidenced by two promissory notes of even date herewith, one of said notes being for the sum of $300.00 and the other of said notes being for the sum of $300.00, both of said last-named two notes becoming due and payable on or before the 1st day of May, 1881, with interest thereon from the date thereof until paid at the rate of six per cent. per annum.

Now, if the said John Nash and Ellen Nash shall well and truly pay said several sums of money when the same shall become
53 due, with the interest as aforesaid according to said promissory notes, then these presents shall be void.

In witness whereof the said John Nash and Ellen Nash, his wife, who hereby releases all her right and expectancy of dower in said premises, have hereunto set their hands and seals this 10th day of November, in the year of our Lord one thousand eight hundred and seventy-nine.

The erasure at the words "said" and "owner" and the interlineation of the name "Ellen Nash" in the 6th line of the covenants of this mortgage were all done before execution hereof, as well as the erasure of the figures 1880 in the fourth line of the condition, and the erasure of the figures 1880 in the 9th line of the condition of this mortgage [and] the erasure of the figure eight in the 5th and 10th lines of the condition were all done before execution of this mortgage.

JOHN NASH. [SEAL.]
NELLIE NASH. [SEAL.]

Signed, sealed, and acknowledged in the presence of us.
THOS. H. WRIGHT.
D. J. HUBEN.

THE STATE OF OHIO, } ss:
Logan County, }

Be it remembered that on the 10th day of November, in the year of our Lord one thousand eight hundred and seventy-nine, before me, the subscriber, a notary public in and for said county, personally came John Nash and Ellen Nash, his wife, the grantors in the foregoing mortgage deed, and acknowledged the signing and sealing thereof to be their voluntary act and deed for the uses and purposes therein

mentioned; and the said Ellen Nash, wife of the said John Nash, being examined by me separate and apart from her said husband, and the contents of said mortgage deed being by me made known and explained to her, as the statute directs, declared that she did voluntarily sign, seal, and acknowledge the same, and that she is still satisfied therewith as her act and deed for the uses and purposes therein mentioned.

54

In testimony whereof I have hereunto subscribed my name and affixed my notarial seal on the day and year last aforesaid, at the county aforesaid.

[NOTARIAL SEAL.] THOS. H. WRIGHT,
Notary Public, Logan County, Ohio.

Received Nov. 16th, 1879, at 6½ o'clock p. m. Recorded Nov. 12th 1879.

JOHN A. COULTER,
Recorder.

THE STATE OF OHIO, } ss:
Logan County, }

I, John A. Coulter, recorder within and for said county, hereby certify that the foregoing mortgage deed is a full and true copy as taken from the mortgage records of said county, volume "S," pages 434, 435, 436, and 437.

In testimony whereof I have hereunto subscribed my name and affixed my seal of office, at Bellefontaine, this 13th day of June, A. D. 1882.

[SEAL.] JOHN A. COULTER,
County Recorder, Logan Co., Ohio.

And afterwards, to wit, on the 26th day of June, A. D. 1883, being a day of the June term, A. D. 1883, of said court, the following mortgage and notes were filed in this cause in this court, viz:

Mortgage.

Know all men by these presents that John Nash and Ellen Nash, his wife, of Logan county, Ohio, in consideration of seven thousand dollars ($7,000.00) to them paid by Hugh Colville, of Cincinnati, Hamilton county, Ohio, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey to the said Hugh Colville, his heirs and assigns, forever, the following-described real estate, to wit:

55

Situated on the south side of Eighth street, in said city of Cincinnati, being all of lot No. twenty (20), and a strip three (3) feet in width off the east side of lot No. twenty-one (21), in Van Harnes' second subdivision, recorded in book No. 85, page 136, of the records of deeds of said Hamilton county, said entire tract commencing about forty-seven (47) feet east of Cutler street and extending eastwardly twenty-eight (28) feet to lot nineteen in said subdivision, and extending back between parallel lines at right angles to said

Eighth street in a southerly direction one hundred and five (105) feet and nine (9) inches, more or less, to Van Horne street, and being the same premises conveyed to said Ellen Nash by Stephen Morse and wife, by deed dated September 23rd, 1872, and recorded in book 405, page 227, of the records of deeds of said Hamilton county, Ohio, and all the estate, title, and interest of the said John Nash and Ellen Nash, his wife, either in law or in equity, of, in, and to the said premises, together with all the privileges and appurtenances to the same belonging, and all the rents, issues and profits thereof; to have and to hold the same to the only proper use of the said Hugh Colville, his heirs and assigns forever. And the said John Nash and Ellen Nash, his wife, for themselves and for their heirs, executors, and administrators, do hereby covenant with the said Hugh Colville, his heirs and assigns, that they are the true
56 and lawful owners of the said premises and have full power to convey the same, and that the title so conveyed is clear, free, and unencumbered, and, further, that they will warrant and defend the same against all claim or claims of all persons whomsoever:

Provided, nevertheless, That if the said John Nash, his heirs and assigns, shall well and truly pay, or cause to be paid, to the said Hugh Colville, his heirs or assigns, three years after the date hereof, the sum of seven thousand dollars ($7,000.00), according to the tenor of a promissory note for said sum, of even date herewith, made by said John Nash, payable to the order of said Hugh Colville three years after date at the Commercial Bank of Cincinnati, with interest at the rate of eight per cent. per annum from date until paid, then these presents shall be void.

In witness whereof the said John Nash and Ellen Nash, his wife, have hereunto set their hands and seals this fourth day of December, in the year of our Lord one thousand eight hundred and seventy-six.

JOHN NASH. [SEAL.]
ELLEN NASH. [SEAL.]

Signed, sealed, and acknowledged in presence of us—
GEO. W. POLAND.
W. A. PURTHHAUGH.

THE STATE OF OHIO, }
County of Champaign, } *ss:*

Be it remembered that on the 4th day of December, in the year of our Lord one thousand eight hundred and seventy-six, before me, the subscriber, a notary public, personally came John Nash and Ellen Nash, his wife, the grantors in the foregoing mortgage
57 deed, and acknowledged the signing and sealing thereof to be their voluntary act and deed for the uses and purposes therein mentioned.

And the said Ellen Nash, wife of the said John Nash, being examined by me separate and apart from her said husband, and the contents of said mortgage being by me made known and explained

to her, as the statute directs, declared that she did voluntarily sign, seal, and acknowledge the same, and that she is still satisfied therewith as her act and deed for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and affixed my notarial seal on the day and year aforesaid.

GEO. W. POLAND,
Notary Public, Champaign County, Ohio.

Endorsed as follows, to wit:

Circuit.

HUGH COLVILLE *vs.* JOHN NASH *et al.*

The premises herein described were sold by me by virtue of an "order of sale" to me directed, issued out of the circuit court of the United States for the southern district of Ohio, in the above proceeding (on Nov. 8, 1879).

J. C. ULLERY,
U. S. M., S. D. Ohio, Actiny as Special Master Commissioner.

Witness-:
RUFUS KING.
HUGH COLVILLE.

58 *Copy of Note.*

$7,000.00. CINCINNATI, *December 4th*, 1876.

Three years after date I promise to pay to the order of Hugh Colville seven thousand ($7,000) dollars, value received, payable at the Commercial Bank, with int. at eight per cent. per annum, int. payable semi-annually.

No. —. Due —.

JOHN NASH.

Endorsed as follows: No. 2871. U. S. circuit court, S. D. O. Hugh Colville. Filed Sept. 18th, 1879. Thos. Ambrose, clerk.

SOUTHERN DISTRICT OF OHIO, *ss:*

A true and correct copy of the mortgage with the endorsements thereon, and also of the note with the endorsements thereon on file in this office.

[SEAL.] Attest: WM. C. HOWARD,
Clerk U. S. Cir. C'rt, S. D. O.

Endorsed as follows: No. 163. 2871. Mortgage from John Nash and Ellen Nash, his wife, to Hugh Colville. Received Dec. 12th, 1876, at 11½ o'clock a. m. In Hamilton county. Recorded in mortgage book No. 393, page 593. Paul H. Williamson, recorder. Transferred. Auditor. Cancelled.

59 And afterwards, to wit, on the 30th day of July, A. D. 1883, a transcript from the circuit court of the southern district of Ohio was filed in this court, viz:

Transcript of the Record and Proceedings in the United States Circuit Court for the Southern District of Ohio.

At a stated term of the circuit court of the United States within and for the sixth judicial circuit and southern district of Ohio, begun and held at the court-rooms in the city of Cincinnati on the first Tuesday of October, being the seventh day of that month, in the year of our Lord one thousand eight hundred and seventy-nine, and in the one hundred and fourth year of the Independence of the United States of America—present, the Hon. John Baxter, circuit judge—among the proceedings had were the following, to wit:

HUGH COLVILLE *vs.* JOHN NASH, ELLEN NASH, JAMES F. CALLAGHAN, The Camargo Man'f'g Co., H. H. Brenneman, Amelia Kilmartin.	Chancery. 2871.

Be it remembered that heretofore, to wit, on the 10th day of May, in the year of our Lord one thousand eight hundred and seventy-nine, came the complainant, by his solicitors, King, Thompson and Maxwell, and filed in the clerk's office of the court aforesaid a certain bill in chancery in this cause, which said bill is in the
60 words and figures following, to wit:

Bill of Complaint.

To the honorable judge of the circuit court of the United States for the sixth circuit and the southern district of Ohio, in chancery sitting:

Your orator, Hugh Colville, of Covington, in the State of Kentucky, and a citizen of said State, brings this his bill against John Nash and Ellen Nash, his wife, of Logan county, in the State of Ohio, and James F. Callaghan, The Camargo Manufacturing Company, H. H. Brenneman, and Amelia Kilmartin, all of the city of Cincinnati, in the State of Ohio, and citizens and residents of the said State. And your orator thereupon complains and says that the said John Nash, at Cincinnati, on the 4th day of December, in the year 1876, for value received, executed and delivered to your orator his promissory note of that date, and thereby promised in three years after the date thereof to pay to your orator, or to his order, at the Commercial Bank in said city, the sum of seven thousand dollars, with interest at the rate of eight per cent. per annum, payable semi-annually, and that the said Ellen Nash, the wife of the said John, and whom, together with him, your orator prays may be made defendants to the bill, then being, or pretending to be, the owner and seized of the real estate hereinafter described, did, at the same time with the making and delivery of said note, together with the said John

Nash, her husband, execute and deliver to your orator their deed of mortgage by them signed, sealed, and acknowledged in due form of law and duly attested, and thereby conveyed to your
61 orator, his heirs and assigns, the following described real estate in the city of Cincinnati, in the county of Hamilton, and in the said southern district of Ohio, to wit; situated on the south side of Eighth street, in said city, being all of lot No. twenty (20) and a strip three (3) feet in width off the east side of lot No. twenty-one (21), in Van Horne's second subdivision, recorded in book No. 85, page 136, of the records of deeds of said Hamilton county, said entire tract commencing about forty-seven (47) feet east of Cutter street and extending eastwardly twenty-eight (28) feet to lot nineteen (19) in said subdivision, and extending back between parallel lines, at right angles to said Eighth street, in a southerly direction, one hundred and five (105) feet and nine (9) inches, more or less, to Van Horn street.

Your orator further states that the said conveyance was made subject to a condition therein contained, that if the said John Nash should well and truly pay to your orator the sum of seven thousand dollars, with interest at the rate of eight per cent per annum, according to the tenor of his said promissory note, then the said conveyance should be void.

And your orator further states that the said deed of mortgage was, by your orator, filed for record in the office of the recorder of the said county of Hamilton on the 12th day of December, in the year 1876, and was recorded in mortgage book No. 393, page 593, in said office, all which, with other matters, will more fully and certainly appear by the said deed and the record thereof, which, or a transcript thereof, your orator will produce in court if required.

62 And your orator further states that the semi-annual instalments of interest, which became due and payable to your orator by the tenor of said note severally at six, twelve, eighteen, and twenty-four months after the date thereof, have not nor has either or any part of them been paid to your orator, though long since due and payable and though your orator has often requested the said defendants to pay the same, and that the amount of the said several instalments, with interest upon each, is now due to your orator on the security of said premises, and that by reason thereof, and by the neglect and refusal of said defendants to pay the said arrears of interest, the estate of your orator in said mortgaged premises has become absolute at law.

Your orator further states that he has been informed that the said James F. Callaghan, The Camargo Manufacturing Company, H. H. Brenneman, and Amelia Kilmartin, all of whom are made defendants to this bill, claim to have some interest in the said mortgaged premises, the nature of which is unknown to your orator, but he charges that his said mortgage is prior and paramount in law and equity to either or any of the said claims if any such there be.

Your orator therefore prays process of subpœna against the said defendants John Nash and Ellen, his wife, and the said James F. Callaghan, The Camargo Manufacturing Company, H. H. Brenne-

man, and Amelia Kilmartin, and that they may be required to make answer to all and singular the matters aforesaid, but not under oath, which your orator hereby waives, and that an account
63 may be taken, under the order of this honorable court, of what is due upon said mortgage to your orator, and that the said John and Ellen Nash may be decreed to pay what shall thus appear to be due with costs, or in default thereof that the said mortgaged premises may be sold and the proceeds applied to pay the same, and that your orator may have such further and other relief in the premises as to the court shall seem equitable and just; and your orator shall ever pray.

KING, THOMPSON & MAXWELL,
Sols. for Comp'ts.

Endorsed as follows, to wit: I acknowledge myself security for costs in this case. May 10th, 1879. Elliott H. Pendleton.

And thereupon there was issued out of the clerk's office of the court aforesaid our certain writ of subpœna in chancery in this cause, directed to the marshal of said district and against the said defendants, which said writ of subpœna is in the words and figures following, to wit:

Subpœna in Chancery.

UNITED STATES OF AMERICA, } *ss:*
Southern District of Ohio, }

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

You are hereby commanded to summon James F. Callaghan, Central Ave. & 8th; The Camargo Manufacturing Company, H. H. Brenneman, and Amelia Kilmartin, 377 W. 8th St. (Cincinnati), citizens of and resident in the State of Ohio, if they be found in your
64 district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the first Monday in June next, to answer a certain bill in chancery filed and exhibited in said court against them by Hugh Colville, citizen of and resident in the State of Kentucky. Herein you are not to fail under the penalty of the law thence ensuing; and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 10th day of May, A. D. 1879, and in the 103rd year of the Independence of the United States of America.

[SEAL.] Attest: THOMAS AMBROSE, *Clerk.*

MEMORANDUM.—The said defendants are required to enter their appearance in this suit, in the clerk's office of said court, on or before the first Monday of June, 1879; otherwise the said bill may be taken *pro confesso.*

THOMAS AMBROSE, *Clerk,*

Elliott H. Pendleton acknowledges himself security for all costs for which the plaintiff may be liable in this suit.

And thereupon there was issued out of the clerk's office of the court aforesaid our certain writ of subpœna in chancery in said cause, directed to the marshal of the northern district of Ohio and against the said defendants, John and Ellen Nash, which said writ of subpœna is in the words and figures following, to wit:

Subpœna in Chancery.

65 UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, }

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to summon John Nash and Ellen Nash, West Liberty, Logan Co., citizens of and residents in the State of Ohio, if they be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the first Monday in June next, to answer a certain bill in chancery filed and exhibited in said court against them by Hugh Colville, citizen of and resident in the State of Kentucky. Herein you are not fail under the penalty of the law thence ensuing; and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 10th day of May, A. D. 1879, and in the 103rd year of the Independence of the United States of America.

[SEAL.] Attest: THOMAS AMBORSE, *Clerk.*

MEMORANDUM.—The said defendants are required to enter their appearance in this suit, in the clerk's office of said court, on or before the first Monday of June, 1879; otherwise the said bill may be taken *pro confesso.*

THOMAS AMBROSE, *Clerk.*

Endorsed as follows, to wit: Elliott H. Pendleton acknowledges himself security for all costs for which the plaintiff may be liable in this suit.

66 *Marshal's Ret. on Subpœna.*

And afterwards, to wit, on the twelfth day of May, in the year last aforesaid, came the marshal of said district, to whom one of said writ of subpœna was in form aforesaid directed, and returned the same into the clerk's office of the court aforesaid with his proceedings endorsed thereon in the words and figures following, to wit:

Rec'd this writ at Cincinnati, O., May 10th, 1879, and served the same in Hamilton county, as follows: And on the within-named James F. Callaghan, by leaving a true copy hereof at his last usual place of residence May 12th, 1879, at 2.10o'clock p. m.; also The Camargo Manufacturing Company, by delivering a true copy hereof to H. H. Brennerman, president, and A. P. Harmer, cashier of said

company, May 12th, 1879, at 11.55 o'clock a. m.; also on H. H. Brenneman, by delivering a true copy hereof to him personally May 12th, 1879, at 11.55 o'clock a. m., and Amelia Kilmartin, by delivering a true copy hereof to her personally May 12th, 1879, at 2 o'clock p. m., as within I am commanded.

J. C. ULLERY, *U.S. M.*,
By C. E. TERIFORD, *Dep't.*

And afterwards, to wit, on the nineteenth day of May, in the year last aforesaid, came the marshal of the northern district of Ohio, to whom one of the writs of subpœna was in form aforesaid directed, and returned the same into the clerk's office of the court aforesaid, with his proceedings endorsed thereon in the words and figures following, to wit:

NORTHERN DISTRICT OF OHIO, *ss:*

On the 17th day of May, A. D. 1879, I made due service
67 of this writ at West Liberty, Logan county, Ohio, by delivering to the within-named Ellen Nash a true and duly certified copy thereof, and at same time and place I left a true and duly certified copy of this writ at the usual place of abode of the within-named John Nash in the hands of his wife, Ellen Nash (he being absent from home). Said John Nash could not be found.

N. B. PRENTICE,
U. S. Marshal,
By JOHN ODEL, *Deputy.*

And afterwards, to wit, on the second day of June, in the year last aforesaid, came the defendants, John and Ellen Nash, by their solicitor, and filed in the clerk's office of the court aforesaid their certain appearance in this cause, which is in the words and figures following, to wit:

Entry of Appearance.

HUGH COLVILLE
vs.
JOHN NASH *et al.* } Chancery. 2871.

Now come John Nash and Ellen Nash, defendants in above action, and hereby enter their appearance herein by Chas. H. Avery, their attorney.

And afterwards, to wit, on the nineteenth day of July, in the year last aforesaid, an entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

Decree Pro Confesso. J'rn'l T., 110.

HUGH COLVILLE
vs.
JOHN NASH *et al.* } Chancery. 2871.

Present: The Hon. Philip B. Swing, district judge.

68 This day came the complainant, by his solicitors, and all the defendants, though duly returned, served with the sub-

pœna in this cause, still failing to plead, answer, or demur to the complainant's bill, as ruled to do, it is therefore ordered, adjudged, and decreed that the same be taken *pro confesso* against all the dedefendants.

And afterwards, but on the same day and in the year last aforesaid, there was filed in the clerk's office of the court aforesaid a certain mortgage in this cause, which said mortgage is in the words and figures following, to wit:

Mortgage.

Know all men by these presents that John Nash and Ellen Nash, his wife, of Logan county, Ohio, in consideration of seven thousand dollars ($7,000.00) to them paid by Hugh Colville, of Cincinnati, Hamilton county, Ohio, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey to the said Hugh Colville, his heirs and assigns, forever, the following-described real estate, to wit: situated on the south side of Eighth street, in said city of Cincinnati, being all of lot No. twenty (20) and a strip three (3) feet in width off the east side of lot No. twenty-one (21), in Van Horne's second subdivision, recorded in book No. 85, page 136, of the records of deeds of said Hamilton county, said entire tract commencing about forty-seven (47) feet east of Cutter street and extending eastwardly twenty-eight (28) feet to lot nineteen in said subdivision, and extending back between parallel lines, at right angles to said
69 Eighth street, in a southerly direction one hundred and five (105) feet and nine (9) inches, more or less, to Van Horne street, and being the same premises conveyed to said Ellen Nash by Stephen Morse and wife by deed dated September 23rd, 1872, and recorded in book 405, page 227, of the records of deeds of said Hamilton county, Ohio, and all the estate, title, and interest of the said John Nash and Ellen Nash, his wife, either in law or in equity, of, in, and to the said premises, together with all the privileges and appurtenances to the same belonging, and all the rents, issues, and profits thereof; to have and to hold the same to the only proper use of the said Hugh Colville, his heirs and assigns, forever.

And the said John Nash and Ellen Nash, his wife, for themselves and for their heirs, executors, and administrators, do hereby covenant with the said Hugh Colville, his heirs and assigns, that they are the trus and lawful owners of the said premises, and have full power to convey the same, and that the title so conveyed it clear, free, and unincumbered, and, further, that they will warrant and defend the same against all claim or claims of all persons whomsoever:

Provided, nevertheless, That if the said John Nash, his heirs and assigns, shall well and truly pay, or cause to be paid, to the said Hugh Colville, his heirs and assigns, three years after the date hereof, the sum of seven thousand dollars ($7,000.00), according to the tenor of a promissory note for said sum, of even date herewith, made by said John Nash, payable to the order of said Hugh Colville, three years after date, at the Commercial Bank of Cincinnati, with interest at the rate of eight per cent. per annum from date until paid.

70 In witness whereof the said John Nash and Ellen Nash, his wife, have hereunto set their hands and seals this fourth day of December, in the year of our Lord one thousand eight hundred and seventy-six.

JOHN NASH. [SEAL.]
ELLEN NASH. [SEAL.]

Signed, sealed, and acknowledged in presence of us—
GEO. W. POLAND.
W. A. PURTHHAUGH.

THE STATE OF OHIO, } ss:
County of Champaign, }

Be it remembered that on the 4th day of December, in the year of our Lord one thousand eight hundred and seventy-six, before me, the subscriber, a notary public, personally came John Nash and Ellen Nash, his wife, the grantors in the foregoing mortgage deed, and acknowledged the signing and sealing thereof to be their voluntary act and deed for the uses and purposes therein mentioned.

And the said Ellen Nash, wife of the said John Nash, being examined by me separate and apart from her said husband, and the contents of said mortgage being by me made known and explained to her, as the statute directs, declared that she did voluntarily sign, seal, and acknowledge the same, and that she is still satisfied therewith as her act and deed for the uses and purposes therein mentioned.

In testimony whereof I have hereento subscribed my name and affixed my notarial seal on the day and year aforesaid.

71 [SEAL.] GEO. W. POLAND,
Notary Public, Champaign County, Ohio.

Which said mortgage is endorsed as follows, to wit: Mortgage from John Nash and Ellen Nash, his wife, to Hugh Collville. Received Dec. 12th, 1876, at 11½ o'clock a. m. In Hamilton county. Recorded in mortgage book No. 393, page 593. Paul H. Williamson, recorder. Cancelled October 14th, 1880. Geo. O. Deckeback, recorder.

Circuit.

HUGH COLVILLE }
vs. } 2871.
JOHN NASH *et al.* }

The premises herein described were sold by me by virtue of an order of sale to me directed, issued out of the circuit court of the United States for the southern district of Ohio in the above proceeding (on Nov. 8, 1879).

J. C. ULLERY,
U. S. M., S. D. O., Acting as Special Master Commissioner.

Witness-:
RUFUS KING.
HUGH COLVILLE.

And afterwards, to wit, on the 30th day of August, in the year last aforesaid, an entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

Journal Entry. Leave, &c.

HUGH COLVILLE
vs.
JOHN NASH *et al.* } Chancery. 2871.

Present the Hon. Philip B. Swing, district judge.

72 On motion to the court leave is given the complainant to file his supplemental bill herein forthwith, and the same is accordingly filed. Which said supplemental bill is in the words and figures following, to wit:

Supplemental Bill.

To the honorable judges of the circuit court of the United States for the sixth circuit and southern district of Ohio, in chancery sitting:

Hugh Colville, of Covington, in the State of Kentucky, and a citizen of said State, brings this his supplemental bill against John Nash and Ellen Nash, his wife, of Logan county, in the State of Ohio, and James F. Callaghan, The Camarago Manufacturing Company, H. H. Brenneman, and Amelia Kilmartin, all of the city of Cincinnati, in said State of Ohio, and citizens and residents of said State.

And thereupon your orator complains and says that since the filing of his original bill herein, to wit, on the 4th day of June, in the year 1879, another semi-annual instalment of interest on the note set forth in his said bill, in the sum of two hundred and eighty dollars ($280.00), became due and payable and has not, nor has any part thereof, been paid, though your orator has requested said defendant, John Nash, to pay the same, and said sum of $280.00, with interest thereon from said 4th day of June, A. D. 1879, is now due to your orator on the security of the mortgaged premises described in his said bill.

73 Your orator therefore prays process of subpœna against the said defendants, John Nash and Ellen Nash, his wife, and the said James F. Callaghan, The Camargo Manufacturing Company, H. H. Brennerman, and Amelia Kilmartin, and that they may be required to make answer to all and singular the matters aforesaid, but not under oath, which your orator hereby waives, and that said John and Ellen Nash may be directed to pay said sum of $280.00, with interest thereon as aforesaid, and costs, or, in default thereof, that the same may be paid out of the proceeds of the sale of the said mortgaged premises, and that your orator may have such further and other relief in the premises as to the court shall seem equitable and just; and your orator shall ever pray.

By RUFUS KING,
THOMPSON & MAXWELL,
Solicitors for Complainant.

And afterwards, but on the same day and in the year last aforesaid, an entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

Decree. J'rn'l Entry. T. 123.

HUGH COLVILLE *vs.* JOHN NASH *et al.* } Chancery. 2871.

Present: The Hon. Philip B. Swing, district judge.

This day came the said complainant, by his solicitors, and all the defendants, though duly served with the subpœna in this cause, still failing to plead, answer, or demur to the said complanant's bill, as ruled to do, it is therefore ordered, adjudged, and decreed that
74 the order *pro confesso* herein entered against all the defendants be made absolute; and thereupon this cause coming on to be heard upon the bill so taken as confessed and the exhibits herewith filed the court, on consideration thereof, finds that the defendants, John Nash and Ellen, his wife, did, on the 4th day of December, in the year 1876, by their deed of mortgage of that date, duly executed, acknowledged, and delivered by them to the complainant on that day, convey to the complainant, his heirs and assigns, all that certain lot of land situated on the south side of Eighth street, in the city of Cincinnati, county of Hamilton and State of Ohio, between Cutter and Mound streets, and as described in said bill by the complainants, with all the privileges and appurtenances to the same belonging, and all the estate, title, and interest therein of them, the said John Nash and Ellen Nash, but upon the condition therein expressed, that if he, the said John Nash, should pay to the complainant seven thousand dollars, with interest at the rate of eight per cent. per annum, payable semi-annually, according to the tenor of a promissory note of the same date made by him to the complainant, then said conveyance should be void, and that the said mortgage was duly filed and recorded on the 12th day of December, in the year 1876, in the recorder's office of said county of Hamilton, and that the instalments of interest upon said note, due in six, twelve, eighteen, and twenty-four months from the date thereof, respectively, for the sum of two hundred and eighty dollars ($280) each, though long
75 since due, are wholly unpaid, and that there was and is due thereon to the complainant, with the interest accrued upon each instalment at the date of this decree, the sum of twelve hundred and nineteen and $\frac{68}{100}$ dollars ($1,219.68), for the payment of which, with interest thereon at the rate of six per cent. per annum from the date of this decree, the complainant has the first lien upon the said real estate described in his bill prior and preferable to any right or claim of either of the defendants in this cause, and is entitled to a foreclosure and sale of said premises, as prayed in his said bill.

It is therefore ordered, adjudged, and decreed that, unless the said defendants, or some of them, shall within thirty days from the

entering of this order pay to the complainant or his solicitors the said sum of $1,219.68 and interest and also all costs in this cause to be taxed, *that* the said real estate described in the complainants' bill be sold by the marshal of this district, as special commissioner for that purpose and as upon execution at law, free, clear, and discharged of all equity of redemption or other right, title, or interest of the defendants, or either of them, and upon failure of the defendants to pay the same within the time so limited that an order of sale be issued by the clerk to the marshal, as special commissioner, commanding him to execute the said order.

And afterwards, to wit, on the eighteenth day of September, in the year last aforesaid, there was filed in the clerk's office of
76 the court aforesaid a certain note in this cause, which said note is in the words and figures following, to wit:

Note.

$7,000.00. CINCINNATI, *December 4th*, 1876.

Three years after date I promise to pay to the order of Hugh Colville seven thousand dollars, value received, payable at the Commercial Bank, with interest at eight per cent. per annum, int. payable semi-annually.

No. — -. Due ——. JOHN NASH.

Endorsed: Hugh Colville.

And afterwards, to wit, on the thirtieth day of September, in the year last aforesaid, there was issued out of the clerk's office of the court aforesaid our certain order of sale in this case directed to the marshal of said district, which said order of sale is in the words and figures following, to wit:

Order of Sale.

The President of the United States of America to J. C. Ullery, marshal, acting as special commissioner:

Whereas at a term of the circuit court of the United States for the southern district of Ohio, in the sixth circuit, began and held at the city of Cincinnati, in said district, on the first Tuesday in the month of April, being the first day of that month, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States of America the 103rd—present, the Honorable Philip B. Swing—among the proceedings had were the following, to wit: On the 30th day of August, A. D. 1879, Hugh Colville, complainant, *vs.* John Nash, Ellen Nash, his wife; James F. Callaghan, The Camargo Manufacturing Company, H. H.
77 Brennerman, and Amelia Kilmartin, defendants.

This day came the said complainant, by his solicitors, and all the defendants, though duly served with the subpœna in this case, still failing to plead, answer, or demur to the said complainants' bill, as ruled to do, it is therefore ordered, adjudged, and decreed that the order *pro confesso* herein entered against all the de-

fendants be made absolute, and thereupon, this cause coming on to be heard upon the bill so taken as confessed and the exhibits therewith filed, the court, on consideration thereof, finds that the defendants, John Nash and Ellen, his wife, did, on the 4th day of December, in the year 1876, by their deed of mortgage of that date duly executed, acknowledged, and delivered by them to the complainant on that day, convey to the complainant, his heirs and assigns, all that certain lot of land situated on the south side of Eighth street, in the city of Cincinnati, county of Hamilton, and State of Ohio, between Cutter and Mound streets, and as described in said bill by the complainant, with all the privileges and appurtenances to the same belonging, and all the estate, title, and interest therein of them, the said John Nash and Ellen Nash, but upon the condition therein expressed that if he, the said John Nash, should pay to the complainant seven thousand dollars, with interest at the rate of eight per cent per annum, payable semi-annually, according to the tenor of a promissory note of the same date made by him to the complainant, then said conveyance should be void, and that the
78 said mortgage was duly filed and recorded on the 12th day of December, in the year 1876, in the recorder's office of said county of Hamilton, and that the instalments of interest upon said note, due in six, twelve, eighteen, and twenty-four months from the date thereof, respectively, for the sum of two hundred and eighty dollars ($280.00) each, though long since due, are wholly unpaid, and that there was and is due thereon to the complainant, with the interest accrued upon each instalment at the date of this decree, the sum of twelve hundred and nineteen and $\frac{68}{100}$ dollars ($1,219.68), for the payment of which, with interest thereon at the rate of six per cent. per annum from the date of this decree, the complainant has the first lien upon the said real estate described in his bill prior and preferable to any right or claim of either of the defendants in this cause, and is entitled to a foreclosure and sale of said premises, as prayed in his said bill.

It is therefore ordered, adjudged and decreed that unless the said defendants, or some of them, shall, within thirty days from the entering of this order, pay to the complainant or his solicitors the said sum of $1,219.68 and interest, and also all costs in this cause to be taxed, that the said real estate described in the complainant's bill be sold by the marshal of this district, as special commissioner for that purpose, and as upon execution at law, free, clear, and discharged of all equity of redemptives or other right, title, or interest of the defendants or either of them.

79 And upon failure of the defendants to pay the same within the time so limited that an order of sale be issued by the clerk to the marshal, as special commissioner, commanding him to execute the said order.

You are, therefore, hereby commanded, as such marshal, acting as special commissioner, to proceed to carry into execution the said decree as you are thereby and therein directed and required, and to return the same, with a report of your doings under the same, to

our circuit court of the United States for the southern district of Ohio with all convenient speed.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States of America.

[SEAL.] Attest: THOMAS AMBROSE,
Clerk U. S. Cir. C'rt.

And afterwards, to wit, on the 6th day of October, in the year last aforesaid, came J. C. Ullery, U. S. marshal, acting as special commissioner in this cause, and in pursuance to the command of said order of sale, having made an appraisement of said premises, filed in the clerk's of the court aforesaid a copy of said appraisement, clothed in the words and figures following, to wit:

Appraisement.

UNITED STATES OF AMERICA, *Southern District of Ohio,* } *ss:*

Whereas by virtue of a certain execution issued from the sixth circuit court of the United States for the southern district of
80 Ohio, wherein Hugh Colville is plaintiff and John Nash and others are defendants, returnable to the — day of —— next, we, C. I. W. Smith, Nicholas Goshorn, [and] Thomas Jenkins, freeholders of the State of Ohio, having been summoned by J. C. Ullery, marshal of the United States for said southern district, acting as special master commissioner, as an inquest to appraise and estimate the real value in money [of] the following-described real estate, in the city of Cincinnati, situated on the south side of Eighth street, being all of lot No. twenty (20) and a strip three (3) feet in width off the east side of lot No. (21) twenty-one, in Van Horne's second subdivision, recorded in book No. 85, page 136, of the records of deeds of said Hamilton county, said entire tract commencing about forty-seven (47) feet east of Cutter street and extending eastwardly twenty-eight (28) feet to lot nineteen (19), in said subdivision, and extending back between parallel lines, at right angles to said Eighth street, in a southerly direction one hundred and five (105) feet and nine (9) inches, more or less, to Van Horne street:

We, having been first duly sworn by said J. C. Ullery, acting as special master commissioner, do, upon actual view of the premises aforesaid, appraise the same at eleven thousand dollars ($11,000.00).

In testimony whereof we have hereunto set our hands and seals this 3rd day of October, 1879.

C. I. W. SMITH, [SEAL.]
NICHOLAS GOSHORN. [SEAL.]
THOMAS JENKINS. [SEAL.]

81 I do hereby certify that the above appraisers, to wit, C. I. W. Smith, Nicholas Goshorn, and Thomas Jenkins, were freeholders of the county of Hamilton and State of Ohio, and that they were duly summoned and sworn by me on this 3rd day of October,

A. D. 1879, and on the same day they returned to me the foregoing appraisement.

J. C. ULLERY,
U. S. M., S. D., O., Acting as Special Master Com'r.

And afterwards, to wit, on the seventh day of October, in the year last aforesaid, an entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

Journal Entry.

HUGH COLVILLE
vs.
JOHN NASH *et al.* } Chancery. 2871.

Present: The Honorable Philip B. Swing, district judge.

On motion of the solicitors of complainant, and good cause shown, it is ordered that the sale of the real estate under the decree heretofore entered in this cause be made upon the premises, and that the order for such sale is ordered to be amended accordingly.

And afterwards, to wit, on the eighteenth day of November, in the year last aforesaid, came J. C. Ullery, U. S. marshal, acting as special master commissioner herein, to whom the said order of sale, subsequently amended, was, in form aforesaid, directed, and
82 returned the same into the clerk's office of the court aforesaid with his report of sale and proceedings endorsed thereon, and also the bill for posters for sale and two proofs of publication, &c., which are in the words and figures following, to wit:

Master Com'r's Report of Sale.

HUGH COLVILLE
vs.
JOHN NASH *et al.* } Chancery. 2871.

Received this writ at Cincinnati, Ohio, Oct. 2nd, 1879. On October 3rd, 1879, I caused to be made the appraisement hereunto attached ($11,000.00), a copy of which I deposited with the clerk on Oct. 6th, 1879. On the 8th day of October, 1879, and on the four succeeding Wednesdays, I gave notice of sale by publication in the Cincinnati Volksblatt, and on the — day of October, 1879, and the four succeeding — in — Cincinnati Gazette, as more fully appears by proofs of publication hereunto attached. On the eighth day of November, 1879, having given notice more than thirty days (30), in accordance with the terms of such notice, I offered the property therein described at public sale, and thereupon struck off and sold the same to Marx Leon for the sum of seventy-three hundred and forty-five dollars ($7,345.00), said sum being more than two-thirds the appraised value thereof, and said Marx Leon being the best and highest bidder therefor.

J. C. ULLERY,
U. S. Marshal, S. D., O., Acting as Special Master Commissioner.

83 *Proof of Publication.*

1st.

STATE OF OHIO, }
Hamilton County, } ss:

Personally appeared before me, a notary public in and for Hamilton county, Charles E. Harsley, for the publishers of the Cincinnati Daily Gazette, who, being duly sworn, says that the annexed advertisement was published in the Cincinnati Daily Gazette, a newspaper printed and of general circulation in said county, in its issues of October 8th, 15th, 22nd, 29th, November 5th and 8th, A. D. 1879, commencing upon the 7th day of October, viz., Wednesday. Affiant further says that a daily and weekly edition of said newspaper is published, and that the circulation of the daily in this county exceeds that of the weekly, and that the cost of the publication in the daily does not exceed that of the weekly.

CHAS. E. HARSLEY.

Sworn to and subscribed before me this 11th day of November, A. D. 1879.

[SEAL.] WILMOT R. KIDD,
Notary Public.

Proof of Publication.

2nd.

STATE OF OHIO, }
Hamilton County, } ss:

Personally appeared before me, a notary public in and for
84 Hamilton county, Adolph Pfarm, for publishers of the Cincinnati Volksblatt, who, being duly sworn, says that the annexed advertisement was published in the Cincinnati Daily Volksblatt, a newspaper printed and of general circulation in said county, once a week for five consecutive weeks prior to the 8th day of November, A. D. 1879, commencing on the 8th day of October previously, and that each insertion was upon the same day of the week, viz., Wednesdays.

Affiant further says that a daily and weekly edition of said newspaper is published, and that the circulation of the daily in this county exceeds that of the weekly, and that the cost of publication in the daily does not exceed that of the weekly.

ADOLPH PHARM.

Sworn to and subscribed before me this 10th day of November, 1879.

[SEAL.] JAMES ALBRECHT,
Notary Public.

And afterwards, to wit, on the 20th day of November, in the year last aforesaid, an entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

Decree of Confirmation. J'rn'l Entry.

HUGH COLVILLE
vs.
JOHN NASH *et al.* } Chancery. 2871.

Present: The Honorable Philip B. Swing, district Judge.

This cause being this day heard upon the return therein made by J. C. Ullery, the marshal and special master commis-
85 sioner, upon the order of sale issued to him out of this court in this cause, dated October 1st, 1879, and the motion by complainant's counsel that the sale so returned be confirmed, and the proceeds thereof be distributed, and the court, having examined said return and proceedings of said marshal and special master, finds that after due appraisement of the property and advertisements of the time and place of sale, in the manner and for the time appointed by law in that behalf, the premises described in the bill and in said order and advertisement were sold to Marx Leon, the highest bidder, at public auction on the premises, pursuant to said notice, for the price of $7,345.00, being more than two-thirds of the appraised value, and that said proceedings and sale were in all respects in accordance with said order and lawful. The court therefore confirms the same, and orders the marshal and special master commissioner to execute a conveyance to said purchaser in fee-simple, free, clear, and discharged of all right, title, or claim of any of the parties in this cause.

And this cause being thereupon heard upon said motion for the distribution of said fund and upon the pleadings, it is ordered—

1st. That the costs in this cause, taxed at three hundred and sixteen $\frac{15}{100}$ dollars, be first paid.

2nd. That the taxes upon said premises due at the time of said sale, and amounting to five hundred and sixty-nine $\frac{38}{100}$ dollars ($569.38), be next paid out of said fund to John G. Fratz, the treasurer of Hamilton county, Ohio.

86 3rd. That the residue of said fund, amounting to the sum of six thousand four hundred and fifty-nine $\frac{47}{100}$ dollars ($6,459.47), be paid to the plaintiff in account of the note and mortgage set up in the complainant's bill and credited as of the date of this decree, said note being the first lien upon said fund, and prepaid by consent of the defendants, John Nash and Ellen Nash.

And afterwards, to wit, on the 25th day of November, in the year last aforesaid, there was filed in the clerk's office of the court aforesaid a certain agreement as to funds, &c., which said agreement is in the words and figures following, to wit:

Agreement of Parties as to Fund in Hands of Special Master.

HUGH COLVILLE
vs.
JOHN NASH *et al.* } Chancery. 2871.

It is agreed by the complainant and the defendants, John Nash and Ellen Nash, his wife, that the fund held by the marshal, acting

as special master commissioner in this cause, and appropriated by the decree to the complainant, shall be paid by the said special master directly to the complainant or his counsel, together with the sum of seventy-three and $\frac{25}{100}$ dollars, taxed in costs for the commission of one per cent. upon the purchase-money.

Nov. 25, 1879.

KING, THOMPSON & MAXWELL,
Sol'rs for Compl't.

CHARLES H. AVERY,
Att'y for John Nash and Ellen Nash, defendants.

87 And afterwards, but on the same day and in the year last aforesaid, an entry was made upon the journal of said court in said cause, which said entry is in the words and figures following, to wit:

J'rn'l Entry.

HUGH COLVILLE
vs.
JOHN NASH *et al.* } Chancery. 2871.

Present, the Honorable John Baxter, circuit judge.

On motion of the complainant, by his counsel, and by the agreement in writing of the complainant and the defendants, John Nash and Ellen Nash, his wife, filed in this casue, it is ordered that the marshal, acting as special master commissioner, pay over to the complainant or his counsel directly the sum of six thousand four hundred and fifty-nine and $\frac{47}{100}$ dollars, appropriated to the complainant by the decree made and entered on the 20th instant, and that the sum of seventy-three and $\frac{25}{100}$ dollars, taxed in the clerk's costs as one per cent. commission on the fund, be retaxed, and that said sum be deducted from the costs so taxed and paid by the special master to the complainant or his counsel, making the sum of $6,532.72 in all to be paid to the complainant and credited upon the note and mortgage set up in the bill.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, } *ss.*

I, William C. Howard, clerk of the circuit court of the United States for said district, do hereby certify the foregoing to be
88 a true and correct transcript of the record and proceedings in the cause wherein Hugh Colville is complainant and John Nash and others are respondents as the same remains on file and of record in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Cincinnati, this 7th day of July, A. D. 1883, and in the 108th year of the Independence of the United States of America.

[SEAL.] Attest: WILLIAM C. HOWARD,
Clerk U. S. Cir. C'rt, S. D. O.

And afterwards, to wit, on the 16th day of August, A. D. 1883, the following opinion of Judge Baxter was filed in this court in this cause, viz:

In the Circuit Court of the U. S. for the Northern District of Ohio, at Toledo.

J. F. D. LANIER *et al. vs.* JOHN NASH *et al.*

On December 4th, 1876, John Nash made two notes, one for $7,000 and the other for $13,000, payable three years after date to the order of Hugh Colville (who was at the time cashier of the Commercial Bank of Cincinnati), with interest at the rate of 8 per cent. per annum, payable semi-annually. He then procured his wife, Ellen Nash, to unite with him in the execution of two mortgages of her property, the first conveying a house and lot in
89 Cincinnati to secure the $7,000 note, and the other conveying the lands involved in this litigation, situated in Logan county, Ohio, to secure the $13,000 note. He then, with the consent of his wife, hypothecated these two notes and mortgages as collaterals with said bank, and the bank made him two loans of $12,000 and $1,000, respectively. For these loans Nash gave his notes, payable at 30 days, and subsequently renewed them from time to time, as he was required by the bank to do. At the time these loans were made Nash owed the bank on previous dealings something over $5,000, for which it held other collaterals, but which were not of sufficient value to secure payment of the amount due. Nash continued to keep an account and do business with said bank until Dec'r, 1877, when he failed, owing the bank, including said loan and previous indebtedness, about $20,000. The bank then proceeded, before the maturity of the note secured thereby, to foreclose the mortgage on the Cincinnati property, and realized therefrom about $6,500, and thereafter and about three weeks before the maturity of the $13,000 note it sold for full value and assigned the mortgage on the Logan county property to complainant, who, upon the maturity of the debt secured thereby, brought this suit to foreclose the same. To this bill John and Ellen Nash, the mortgagors, and several other persons, who it is alleged assert some claim to the property, are made defendants. Among them are Maurice Walsh and Johanna Malon.
90 These defendants, by their answers, allege that after the execution of the aforesaid mortgages to Colville, one of which is sought to be foreclosed herein, John and Ellen Nash mortgaged a part of the lands embraced therein to Edward Purcell to secure a debt of $5,200, which said John Nash owed him; that, for value, &c., the said Edward Purcell had assigned said debt and mortgage to them; that said $7,000 and $13,000 mortgages to Colville were only pledged to secure payment of the $12,000 loan made by the Commercial Bank to John Nash as aforesaid, and, upon these allegations, they contend that the complainants are only entitled, as against them, to a decree for the balance of said loan and interest thereon after deducting the $6,500 realized from the Cincinnati property. The complainants, *per contra*, insist that said two mortgages were

hypothecated, as well to secure said bank the balance due it on previous dealings as the loans made thereon. This is the first issue of fact presented for our determination.

Upon this issue we find that said mortgages were hypothecated to secure said two loans of $12,000 and $1,000 only, and that said bank had no right to enforce the same for any greater sum as against the defendants herein.

But the complainants insist that they are purchasers, in due course of business, of the mortgage in question before its maturity at
91 its full value and without notice of defendants' equity, and that therefore the equity claimed by defendants ought not to be allowed as against them. But we think their alleged purchase was a mere device by which the Commercial Bank could collect through complainants; that the sale was in contemplation of a court of equity, and, in fact, an assignment for the purpose of collection, and that if anything more was in fact intended the circumstances attending and connected with the sale were sufficient to have put complainants on enquiry, and that consequently they have acquired thereby no other or greater rights than were possessed by the bank from whence they derived their title.

A reference will therefore be made to ascertain the amount due complainants on said mortgage upon the basis herein declared.

And on the confirmation of such report a further decree ordering a foreclosure of said mortgage, adjusting the equities as between the several defendants, with all such other provisions as may be necessary to a final disposition of the case, will be entered. The decree of reference herein ordered will be entered at the ensuing adjourned term.

BAXTER, *Judge, &c., &c.*

On the 30th day of November, A. D. 1880, the following depositions were filed and submitted on the hearing thereof.

92 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

J. F. D. LANIER, CHARLES LANIER, JOHN W. ELLIS, EDWARD D. Adams, Edward Winslow, and Daniel B. Safford, Partners under the Frm Name of Winslow, Lanier and Company, Complainants,

against

JOHN NASH, ELLEN NASH, EDWARD PURCELL, WILLIAM H. WEST, James Walker, William A. West, James Kernan, James Kernan, Jr., Mariah Marquis and Elmira Marquis, Partners under the Firm Name of M. & E. Marquis; William Goodrich, Dennis Madigan, and A. E. Burkhardt and Company, Defendants.

The complainant will take notice that the defendants, John Nash, Ellen Nash, and Walsh and Mahon, will, on the 6th day of October, 1880, between the hours of nine o'clock a. m. and nine o'clock p. m. of said day, take the depositions of Hugh Colville, Elliot H. Pendleton, Rufus King, D. J. O'Connell, and J. M. L. Blair and others at the law office of Mallon and Coffey, No. 6 West Fourth street, in

the city of Cincinnati, in the county of Hamilton, in the State of Ohio, continuing the taking thereof, if need be, from day to day, between the same hours, until completed, which depositions are to be used as evidence on the trial of the above cause, the said witnesses living more than one hundred miles from Toledo,
93 in the State of Ohio, the place of trial.

Dated this 27th day of Sept., 1880.

WILLIAM H. WEST,
JAMES KERNAN, AND
P. MALLON,
Attorneys for Ellen Nash and John Nash.
P. MALLON,
Attorney for Walsh & Mahon.

Service of the within notice acknowledged this 27th day of Sep- of September, 1880.

R. P. RANNEY,
Sol. for Comp'ts.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

J. F. D. LANIER, CHARLES LANIER, JOHN W. ELLIS, EDWARD D. ADAMS, Edward Winslow, and Daniel B. Safford, Partners under the Firm Name of Winslow, Lanier & Company, Complainants,

vs.

JOHN NASH, ELLEN NASH, EDWARD PURCELL, WM. H. WEST, James Walker, William A. West, James Kernan, James Kernan, Jr., Mariah Marquish & Elmira Marquis, Partners under the Firm Name of M. & E. Marquis; William Goodrich, Dennis Madigan, and A. E. Burkhardt and Company, Defendants.

Depositions of Hugh Colville and other witnesses, taken in pursuance of the annexed notice on behalf of John Nash, Ellen Nash, and Walsh and Mahon, defendants in the above-entitled cause, at the law office of Mallon & Coffey, No. 6 W. Fourth St., in the city of Cincinnati, State of Ohio, begun on Wednesday, October 6, 1880, at 2 o'clock p. m. and continued as hereinafter noted.

Present: Rufus King, of counsel for Winslow, Lanier &
94 Co.; P. Mallon, of counsel for Jno. & Ellen Nash and Walsh and Mahon.

Hugh Colville.

HUGH COLVILLE, of lawful age, being first duly sworn, deposes and says as follows:

Ques. 1. Please state where you reside and at what time you were cashier of the Commercial Bank of Cincinnati.

A. 1. My residence is Covington, Kentucky; I was cashier of the Commercial Bank for several years prior to July 1st, 1879.

The further taking of testimony adjourned by consent until Thursday, Oct. 7th, 1880, at 2 o'clock p. m.

Depositions resumed at the above time.

Present: P. Mallon, on behalf of John & Ellen Nash and Walsh and Mahon; also Rufus King, on behalf of Winslow, Lanier & Co.

Ques. 2. Please state if the mortgage sued upon in this case was taken and owned by the Com'l Bank, and what other mortgage, and when.

Ans. The mortgage sued upon in this case was owned by the Commercial Bank, and the Commercial Bank also owned another mortgage for $7,000.00 on a dwelling-house on Eighth street, in Cincinnati; it was held on the 1st day of January, 1879.

Ques. 3. State when these mortgages were made and what loan was made to Nash at that time and by whom.

A. On or about the 4th day of December, 1876, there was a loan of $12,000.00 made to him by the Commercial Bank.

Q. 4. For what time was that loan?

A. Thirty (30) days.

Q. 5. Did the bank take a note for the loan?

A. Yes.

95 Q. 6. Did the bank foreclose the 8th-street mortgage; and, if so, how much did it pay on the loan, and when?

A. The bank foreclosed the Eighth-street mortgage; the amount received I don't remember; the date I don't remember.

This question and answer objected to by counsel for the plaintiffs as incompetent, and production of the record required if held to be relevant.

Q. 7. State as near as you can the amount received by the Commercial Bank as proceeds of the 8th-St. mortgage, and when.

Same objection to this question as above.

A. Well, it is impossible for me to remember either the amount received or when.

Q. 8. Who would know?

A. The books of the bank would show.

Q. 9. Did the Com'l Bank have any contract with Ellen Nash concerning these mortgages?

A. No, sir; not to my knowledge.

Q. 10. Did you?

A. No, sir.

Q. 11. When and to whom did you transfer these mortgages?

A. I indorsed them immediately to the Commercial Bank.

Q. 12. You mean when Nash first presented them?

A. No, sir; but after the loan had been made by the bank to Mr. Nash.

Q. 13. How long after.

A. Directly after the discount was made by the bank to Mr. Nash.

Q. 14. For $12,000 was the discount?

A. Yes, sir.

Q. 15. Was the proceeds of 8th-St. lot credited upon the $12,000?

96 Question objected to as incompetent by counsel for plaintiffs.

A. I don't remember.

Q. 16. Are you part owner of assets of Com'l Bank, old one, and is not this claim now belonging to the bank, and have you not an interest in it?

A. I am part owner of the assets of the old Commercial Bank; whether this claim belongs to the old bank or the present bank I do not know. If the claim belongs to the present bank I have no interest in it.

Q. 17. Was it the old bank that made the loan to Nash?

A. Yes.

Q. 18. Did you or the old bank owe Winslow, Lanier & Co? What was done with this claim by the old bank?

A. Neither the Commercial Bank nor myself were indebted to Winslow, Lanier & Co. All of the assets of the old bank were transferred to two trustees for collection and settlement or disposing of.

Q. 19. How came Winslow, Lanier & Co. to hold this mortgage sued on?

A. That I know nothing about.

Q. 20. Who now owns this claim sued on?

A. I know nothing about it.

Q. 21. Who were the trustees, and what were they trustee- of and for what?

A. Elliot H. Pendleton and Thomas Sherlock; they were trustees for the partners in interest of the assets of the old bank, to dispose of and settle the assets of said bank.

Q. 22. Who were partners of old bank; when did it cease business; who are partners of new bank?

A. The old bank was a partnership; the name- of the
97 partners I cannot now remember; they were quite numerous; the present bank is a corporation; the old bank ceased business about the 4th of July, 1879.

Q. 23. Who transferred this mortgage to Winston, Lanier & Co., and when?

A. I know nothing about it.

Q. 24. Have the trustees accounted to you or the old bank for this claim, or the proceeds of [the] 8th-St. lot?

A. I have never had any report from the trustees as to what they have or have not done.

Q. 25. Who was the book-keeper of the old bank?

A. We have had several book-keepers.

Q. 26. When was the 8th-St. lot sold?

A. That I don't know.

Depositions adjourned by consent until Friday, October 8th, 1880, at 9.30 a. m.

Depositions resumed at the above time.

Present: Judge Mallon, of counsel for Nash *et al.;* Mr. Rufus King, of counsel for plaintiff.

Cross-examination:

X Q. 1. When were the assets transferred by the old bank to the trustees, as stated in your answer- to questions 18 & 21?

A. On or about the 4th of July, 1879.

X Q. 2. Was it not at or about that time that you indorsed the two notes and mortgages made by Nash and wife to you?

A. I do not remember the time or date that I indorsed the notes and mortgages.

X Q. 3. State any circumstances that may enable you to recall or fix the time.

A. I can't remember any.

98 X Q. 4. Let me ask whether I did not bring those two notes and mortgages to you for your indorsement at the time this transfer of assets by the old bank was being made, and did you not indorse them in my presence?

A. Yes; now I remember Mr. King's bringing them to me at the time of the transfer of the assets and my indorsing them there in his presence. The foreclosure suit on the $7,000.00 mortgage, 8th-St. house, was brought in my name as trustee, and the claim was transferred by me to the bank or the trustees before the suit was concluded.

X Q. 5. When did the present bank reorganize and open business?

A. On or about the 4th of July, 1879.

X Q. 6. Were not all the current notes and bills which were transferred by the old bank to the trustees sold and transferred by the latter to the present bank immediately after?

A. Yes.

X Q. 7. Were not these two notes and mortgages made by Mr. & Mrs. Nash included among the assets thus sold and transferred to the present bank?

A. That I do not know, as I never saw a list of what the present bank took or left.

X Q. 8. In answer to question 3 in chief you stated that a loan of $12,000.00 was advanced to Mr. Nash at the time when those notes and mortgages were made to you Please state what other indebtedness was secured by those two notes and mortgages.

Question objected to by defendants.

99 A. We lent Mr. Nash the $12,000.00 with this collateral, with the understanding that he was to pay the balance of his indebtedness to the bank, which at that time was in the neighborhood of $6,000.00 or $7,000.00, as well as I can remember.

X Q. 9. Was there not a further advance of $1,000.00 cash made upon this collateral in addition to the $12,000.00 above stated?

A. Yes; there was.

X Q. 10. Was it not the agreement of the parties that the bank

would advance these $13,000.00 upon these notes and mortgages in consideration that they should also cover this previous indebtedness?

Question objected to by defendants.

A. Yes, sir; from the proceeds of the sale of these mortgage notes our entire indebtedness was to be paid.

X Q. 11. Please state whether renewal notes were not thereafter made and continued alike for the new advances as well as the previous indebtedness, and for what time these renewal notes were usually made.

Question objected to by defendants.

A. Yes; for thirty, sixty, or ninety days; for different times.

X Q. 12. Was it not agreed that all these renewals should be made and kept upon the collateral security of the two notes and mortgages so made to you by Mr. & Mrs. Nash?

Question objected to by defendants.

A. Yes; that was the understanding.

Re-examination:

Q. 1. To whom was the $12,000.00 note made, and who now holds it?

100 A. The loan was made on the $12,000.00 note for thirty days, and at the expiration of the thirty days surrendered to Mr. Nash and a new note given by him for $12,000.00, and both notes were made payable to the Commercial Bank. I don't know whose possession it is in unless it is with the trustees of the bank.

Q. 2. When you took the two mortgages for $7,000 and $13,000 and loaned the $12,000, what was the old debt of Nash & Co., and how secured? State exactly.

A. I couldn't state exactly without referring to the books or the notes themselves.

Q. 3. How much was received by the bank on the old collaterals on the old debt of Nash to the bank, and how is the account now?

A. That I can't tell.

Q. 4. Then what is it you say the two mortgages were collateral to beside the $12,000?

A. Any indebtedness that he then owed us.

Q. 5. Then there was no specific contract?

A. None but an understanding or agreement.

Q. 6. With whom?

A. That was the understanding with the board when the money was lent to him, and with Mr. Nash.

Q. 7. When Mr. King presented you the mortgage- to transfer, in July, 1879, to whom did you transfer them?

A. I transferred them in blank. I merely indorsed them.

Q. 8. What Did Mr. King have them for, and what did he do with them?

A. He brought them to me, as the attorney of the bank,
101 for my indorsement; further than that I know nothing of them.

Q. 9. The attorney of new bank?

A. No; the old bank.

Q. 10. What is the date of the last renewal of the $12,000? How many renewals was there?

A. That I couldn't answer without looking at the notes themselves or the books.

Q. 11. When Nash got the $12,000 was it not understood that he was to get another party to take the $12,000 note and the two mortgages, and if this had been done would not you have given up the two mortgages?

A. With the understanding that the balance of the debt should be paid.

Q. 12. The bank held other collaterals for the old debt, did they not?

A. They held two bonds of the Springfield and Columbus R. R., which we didn't attach any value to, and some other notes to which we also attributed little value.

Q. 13. You say you transferred the suit on the $7,000 mortgage to the bank. Was the mortgage due for the full amount, and was it all collected?

Question objected to by plaintiffs' counsel without the production of the record.

A. I transferred the mortgage, as I have already said. The balance of the question I am unable to answer.

Q. 14. You have stated you could not state old debt of Nash without books. Can you examine the books or tell me the proper party to call?

A. The books are in the hands of the trustees, and they alone have control of them.

Q. 15. Have you had any dealings with Winslow, Lanier & Co. in relation to these mortgages?

102 A. No.

Q. 16. Who became president of bank after July 4th, 1879?

A. Charles B. Foote.

Q. 17. When was G. H. Hill and Pendleton presidents of the bank?

A. Mr. Pendleton was president previous to Mr. Hill, and Mr. Hill from January 1st, 1878, and during a greater portion of that year.

Q. 18. Were you cashier from time you took the two mortgages until July, 1879, and, if so, state how the notes and account of Nash & Co. were carried along, and how long the old debt had existed, and how it stood when you took the mortgages. When you transferred the two mortgages, where was the $12,000 note then?

A. I was cashier during that time. The accounts and notes of Nash & Co. were carried along by renewals of notes from time to time. Mr. Nash had been keeping his account with us for

many years and doing a regular business with us, and his indebtedness to us varied from time to time. I can't tell how the debt stood at the time we took the mortgages. I don't know where the $12,000.00 note was at the time of the transfer of the mortgages.

HUGH COLVILLE.

The further taking of depositions adjourned by consent until Saturday, October 9th, at 2 o'clock p. m.

Depositions renewed at above time.

Present: Rufus King and P. Mallon on behalf of all parties.

Elliott H. Pendleton.

ELLIOTT H. PENDLETON, being first duly sworn, deposes and
103 says as follows:

Q. 1. Please state if you were president of Com'l Bank of Cincinnati in 1876, '7, and '8.

A. I went out in the early part of 1878—about the early part of February, as nearly as I recollect.

Q. 2. When were you trustee?

A. Immediately previous to July, 1879, and am still trustee.

Q. 3. State where the $12,000 note is that Nash gave the bank.

A. I, as trustee, transferred it to the present bank.

Q. 4. Where is the note now?

A. I can't say.

Q. 5. Are you a director of the present bank?

A. I am.

Q. 6. Where are the other evidences of debt—the old account of Nash?

A. Transferred to the present bank.

Q. 7. Has not Mr. King here present all these notes as attorney for the present bank?

A. I should say not.

Q. 8. Who owns these notes you speak of?

A. The present bank did own them. They were all transferred to the present bank.

Q. 9. How much did you, as trustee, get for them?

A. That I can't say. The record will show. We treated them as all good assets.

Q. 10. I wish you would state the transaction of your transfer of these notes. I wish to know who is now the holder of them.

A. They were transferred to the Commercial Bank. They were transferred to the new bank with the other assets, being a purchaser of them with the other assets. I can't say who is now the holder of them. The present bank, I believe, sold them
104 to Winslow, Lanier & Co., of New York.

Q. 11. For how much did they sell them?

A. I don't know. The books of the bank will show that.

Q. 12. Who is the book-keeper, and what officer of the bank would know?

A. Possibly the president or cashier, by reference to the books.

Q. 13. How much money did the present bank pay you, as trustee, for these notes?

A. They were taken as all good assets in the purchase.

Q. 14. You did not answer the question. Is it not true you have never been paid for these notes?

A. No; that is not true. We have been paid for them.

Q. 15. Still you have not answered the 13th question.

A. Par and interest, as all good assets were taken.

Q. 16. How much did the $7,000 8th-St. mortgage pay?

A. I don't know.

Q. 17. Who got the money?

A. I presume the present bank.

Q. 18. When Nash bro't you the $13,000 and the $7,000 mortgages the bank loaned him $12,000 on them, did you?

A. We lent him $12,000.00, but the notes of $13,000 and $7,000 were to cover other indebtedness.

Q. 19. Did you let P. Roach have these notes and mortgages upon the proposition to let him have them if he would take the $12,000 loan?

A. I don't remember any such transaction or offer.

Q. 20. Do you know Roach?

A. Not personally; only by reputation.

Q. 21. You know him by sight?

A. Not certainly.

Q. 22. When and by whom was the mortgage sued upon transferred to Winslow, Lanier & Co.?

105 A. I don't know. Most of the time after I left the presidency of the bank I was under treatment in New York, and therefore am not familiar with much of the business during my absence.

Q. 23. How much did Winslow, Lanier & Co. pay for said mortgage?

A. I do not know.

Q. 24. Who does?

A. I presume the present officers of the bank—the officers who have access to the books—the president and cashier.

Q. 25. Why was the $7,000 mortgage sued upon in Colville's name?

A. As a matter of law I have to refer you to the attorney to answer that question.

Q. 26. Is Mr. King the attorney for the present bank?

A. Yes, sir.

Q. 27. When was the transfer made to Winslow, Lanier & Co., and what was transferred, and upon what consideration?

A. I can't tell the time, nor do I know the particulars of the transaction.

Q. 28. It was after July 1st, 1879, was it not?

A. Yes, sir; it was done by this bank.

Q. 29. The debt against Nash was then years past due, *were they* not?

A. If it refers to the old indebtedness it was.

Q. 30. The two mortgages you say were collateral to the $12,000 and the old debt. State what other collaterals you had to old debt and what it was.

A. There were two railroad bonds; I don't recollect what road, but regarded by us of little value.

Q. 31. Do Winslow, Lanier & Co. hold the mortgage for collection?

A. I suppose the mortgage was transferred with the notes when sold, but cannot say certainly.

Q. 32. The transfer of these old debts by you, as trustee, to
106 the bank, and by bank to Winslow, Lanier & Co., seem to me so unusual that I would ask you for the reasons and inducement to the transactions.

A. I, as trustee, only transferred to the present bank. The transfer to Winslow, Lanier & Co. I have stated I do not know the particulars.

Q. 33. I wish you to state if the present Com'l Bank is not now the owner of the old debts and the $12,000 debt of Nash?

A. I can't state that; I don't know.

Q. 34. You are in the bank as a director almost daily; been there to-day since subpœna?

A. Yes, sir.

Q. 35. May I ask you why you cannot tell who is owner of the Nash claims?

A. Because I paid very little attention during the past year or two to the affairs of the bank, being absent from the city frequently.

Q. 36. Look at the papers now shown you; annex them to your answer. State who wrote them and if the statement is true.

A. I can't say certainly who wrote any of them, and don't know the record; the books will show.

(The papers hereto referred to are marked Exhibits "A," "B," and "C," and annexed to this deposition.—E. J. D., notary.)

Depositions adjourned by consent until Monday, October 11th, A. D. 1880, at 9 a. m.

Depositions resumed at the above time.

Present: Judge Mallon for defendant-, and Hon. Rufus King for plaintiffs.

Q. 37. If you transferred the old assets to new bank how did it happen the $7,000 was sued by Colville, and to whom
107 did Colville transfer it after suit began?

A. I can't tell.

Q. 38. How much is now due from Nash to Com'l Bank, and what would the two collaterals amount to—the $13,000 and $7,000 mortgages?

A. I don't know what is now due; that is a matter of record with the present bank. The two mortgages would amount to the principal and interest.

Q. 39. Is it customary among bankers to take old notes from another bank without indorsement and then sue the makers? Is there anything unusual in this transaction?

A. I don't know what is customary in that respect. I can't answer the latter question unless it is more definite.

Q. 40. Is it not true that the notes evidencing the debt against Nash have been separated from the collaterals, and only one collateral sent to Winslow, Lanier & Co.?

A. I believe but one was sold to Winslow, Lanier & Co.

Q. 41. If, now, you credit the proceeds of the $7,000 mortgage on the $12,000 loan how much would be due on the Winslow, Lanier & Co. claim or collateral?

Question objected to as irrelevant by plaintiffs' counsel.

A. I can't answer. I don't understand the question as stated.

Q. 42. Why did the Com'l Bank separate the notes evidencing the debt from the collaterals?

A. It is very customary to sell the collaterals to pay off the indebtedness.

Q. 43. When you took the $13,000 and $7,000 mortgages from Nash and loaned him the $12,000 state what old debts he then owed the bank; specify them, name and amount.

108 A. As I recollect they amounted to between $5 and $6,000.00. I cannot give the amounts of the separate notes; there were several. I don't remember particularly whether they were all his own notes or business paper.

Q. 44. You said above it was customary to sell the collaterals to pay the indebtedness. Do you mean to say Winslow, Lanier & Co. can collect the $13,000 without reference to what Nash owes the bank?

A. Yes; they have got nothing to do with what he owes the bank.

Q. 45. Is there anything unusual in Winslow, Lanier & Co. suing [on] this paper instead of returning it to your bank, where they obtained it?

A. I don't know that there is. I don't know the particulars of the sale.

Q. 46. I see by the court papers that neither you, as trustee, -or your new bank indorsed this paper. Anything unusual in that?

A. I don't know that there is.

Q. 47. Are not Winslow, Lanier & Co. collecting this for the new bank, and has not Mr. King, as attorney, the control of the claim?

A. I will have to refer you to the bank for all the particulars.

Q. 48. I wish you to answer. Do you not know the fact is substantially as I ask?

A. I do not know the particulars of the sale to Winslow. I was absent from the city.

Q. 49. Who made this sale, and who was authorized to make it?

A. I can't tell; that information can be obtained from the present bank.

Q. 50. You are in the bank as a director, and who do you mean by the present bank?

109 A. I mean the officers of the present bank.

The plaintiffs except to the relevancy and the competency of all

the foregoing testimony, and, without waiving said exceptions, now cross-examine.

Cross-examination:

X Q. 1. If you have any knowledge as to the agreement and consideration upon which the two notes of Mr. Nash for $7,000 and $13,000, respectively, which have been referred to, and the two mortgages by Mr. and Mrs. Nash for securing payment of the same, were executed and delivered, please state the same fully.

A. They were given for the purpose of securing a loan of $12,000 and the balance of an indebtedness, of between $5,000 and $6,000, due by Mr. Nash to the bank.

X Q. 2. By and between what persons was this agreement negotiated?

A. The loan was authorized by the board. I do not remember whether the arrangement with Mr. Nash was made by Mr. Colville, who was cashier, or by myself. Proposals for loans were made either to Mr. Colville or to myself, and such proposals were referred to the board.

X Q. 3. You say $12,000; please state whether the agreement for new advances was limited to that amount, or whether it did not admit of securing a larger amount if Mr. Nash should require it.

A. It was made to cover Mr. Nash's indebtedness which existed at that time, and may have been to embrace a still further small advance, but I don't think that anything of that kind was conditioned on the loan.

X Q. 4. Was there not, in fact, a further advance of $1,000
110 made upon these collaterals to Mr. Nash shortly after the advance of $12,000?

A. I do not remember that there was; the cashier, and not the president, is the one who carries out the instructions of the board in regard to loans.

X Q. 5. In the negotiations for the loans did Mr. Nash state for what object or purpose he wanted these advances; if so, what was it?

A. He stated they were for the purpose of paying other indebtedness of his outside of the bank.

X Q. 6. What consideration was offered to induce the bank to make him these further advances?

A. It was that the old indebtedness of Mr. Nash would be paid or secured.

X Q. 7. How secured?

A. By the notes of $13,000 and $7,000 secured by mortgage of property belonging to Mr. and Mrs. Nash.

X Q. 8. Have you any personal knowledge of the transaction between the Commercial Bank and the plaintiffs as to the note and mortgage now in suit?

A. No, I have not.

X Q. 9. Referring to question 41, to which have answered above, do you know either the total amount which was due from Mr. Nash

to the Commercial Bank or the amount which was realized by the bank on the $7,000 mortgage?

A. I do not.

ELLIOTT H. PENDLETON.

D. J. O'Connell.

D. J. O'CONNELL, being first duly sworn, deposes and says as follows:

111 Q. 1. Please state your business in 1876 and whether you were present at the Com'l Bank when Nash got a loan for $12,000. If so, state what was said and done and by whom.

Question objected to by plaintiffs — to the relevancy and competency as against them.

A. At that time I was book-keeper for the firm and was present at the time he got the loan from the Commercial Bank; the only thing that I can remember about any conversation that took place was the conversation between Nash and Mr. Pendleton regarding the amount of money to be loaned, Nash wanting $12,000 and Pendleton saying that he had previously asked for but $10,500.00; there was a conversation that took place between Colville and ourselves—Nash and myself—three of us, at the foot of the stairs of the Commercial Bank, four or five days previous to the loan; that is just the time they agreed to take it, saying that the directors had agreed to make the loan needed at the time to compromise with his creditors, provided he would do the best he could to get some party to take the loan from the bank, and he said at the time that the bank was not in the habit of loaning money on that kind of security for so long time.

Q. 2. State if anything was said about the old debt of Nash.

Same objection as in one above.

A. Not that I know of; there was nothing said about it at all.

Q. 3. Then what were the $13,000 and $7,000 mortgage-collateral for?

Same objection as above.

A. They were collateral for the $12,000.00 note; that was all at that time.

Q. 4. What old debts had the bank then of Nash & Co. and what collaterals had the bank?

112 Same objection as above.

A. There were notes as follows: One note of F. C. Weir, indorsed by L. C. Weir, for $265.00; date and time I can't remember; they have the note in their possession and can ascertain the date from that; one note of John Nash & Co. for $283.86, secured by three notes of Evans, Clifton & Co.; Evans, Clifton & Co.'s note, secured by a trust mortgage to William Means, trustee, and one note of John

Nash & Co. for $1,368.75, to which was attached as collateral one note of D. C. Pierce of same amount, date and time unknown to me. All of these notes above mentioned were renewed from time to time by the bank as they became due, the bank always holding these same notes as collaterals. They also had one note of the I., C. & L. Railway Co. given to Nash & Co. by the said railroad Co. previous to their going into the hands of a receiver. This note they held as collateral for a note of John Nash & Co.'s for same amount and which they carried until, I think, some time in the year 1878, when the receiver paid the R. R. Co.'s note and the bank returned John Nash & Co.'s note to me. I never had anything to do with John Nash's private account. I know nothing whatever about it, except what I heard him say. In making the foregoing statement I have used the paper marked Exhibit "C," annexed to E. H. Pendleton's deposition, to refresh my memory.

Q. 5. Were you the book-keeper until Nash & Co. made an assignment; are you the assignee, and did the Com'l Bank or Winslow, Lanier & Co. make proof to you of the claim or debt?

Same objection as above.

113 A. Yes. I was book-keeper and am assignee; the Com'l Bank made proof of claim to me.

Q. 6. Did Geo. H. Hill, while president of the bank, claim of you a settlement of the old debts of Nash?

Same objection as above.

A. He came to see me at the office of John Nash & Co., on Carr Str., some two or three months after the assignment of John Nash & Co. to me, and claimed that I should pay personally the over-draft of $122.45, as they would not have allowed Nash & Co. to overdraw their account but for the fact that I had charge of the transaction and supposed I would make it good. He also asked me to try and get John (meaning Nash) to stop in at the bank and give them new notes for the loans to which the collaterals were attached, aside from the mortgages, so as to make the bank secure under the mortgage for all debts of John Nash & Co. This conversation I repeated to Nash and told him not to do it.

Q. 7. Did the Com'l Bank return to you or to Nash any of the collaterals they held for old debt or account for their collection, and have you not forgot to mention some Springfield bonds or stocks?

Same objection as above.

A. The Commercial Bank reported to me through their paying teller, M. E. Ingalls, receiver, having paid the I. C. & L. R. R. note; they made no report whatever of any interest being received, if any was received, simply handing me back the note of Nash & Co. for which said I. C. & L. note was collateral; the Springfield
114 bonks or stock I never saw, as they were attached to John Nash's private paper and had no connection with the firm's affairs. I wish to state in regard to the Pierce note that several months after the assignment Mr. Colville asked me what prospect

there was for them getting their money out of Pierce. I wrote to Pierce at Chicago, and for an answer to his question gave him Pierce's letter to me. Regarding the Weir note Mr. Hill asked me when at the office if I would testify to the facts in the case if they would sue L. C. Weir as indorser, saying he thought they could get their money from him. This conversation was about the note for $265.00, which the bank held as collateral for the $272.40 note.

Q. 8. You say the two mortgages were given as collateral to the loan at the time of $12,000. Can you give any circumstances or facts additional to what you have stated?

Same objection as above noted.

A. One day Nash and myself were in the bank together; Nash told Colville he thought he could sell the house on 8th street for $8,000 or $8,500, I forget which amount, but it was one of the two amounts. Colville told him to do so, saying they could apply that on the money loaned, which would leave but a small loan and reduce the interest very much. Colville asked me on several occasions, when at the bank, whether we had succeeded in finding anybody to take that loan from them. On one occasion, when getting the $12,000 note renewed, I wanted him to make the time of renewal longer than 60 or 90 days, as the case might be, and he said, "No, you might find somebody in less time to take the loan from
115 us." The reason the bank made the first note of $12,000.00 sixty or ninety days' time, as the case might be, was the understanding at the time with Nash that some person (whom I think was Patrick Roach) was to loan him the $20,000 on the two mortgages as soon as he would get his (Roach's) money affairs straightened up.

Q. 9. Where was Ellen Nash when the loan was made?

Same objection as above.

A. To the best of my knowledge she was at West Liberty.

Q. 10. Has the Com'l Bank reported to you the proceeds of the $7,000 mortgage?

Same objection as above.

A. They have not.

Q. 11. The notes held by the Com'l Bank matured when? I do not mean the mortgage notes.

A. Since the first of January, 1878, there were no renewals to the best of my knowledge.

Mr. King, as counsel for plaintiffs, excepts to all the foregoing testimony as irrelevant and incompetent as against such plaintiffs, and cross-examination is waived.

D. J. O'CONNELL.

Depositions, by consent, adjourned until Tuesday, Oct. 12th, A. D. 1880, at 9.30 a. m.

Depositions resumed at above time.

Present: Judge Mallon, of counsel for defendants, and Hon. Rufus King, of counsel for plaintiffs.

Charles B. Foote.

CHARLES B. FOOTE, being first duly sworn, deposes and says as follows:

Q. 1. Are you now and how long have you been president of the Commercial Bank of Cincinnati?

116 A. I am now and have been since July 7th, 1879.

Q. 2. Did your bank ask Winslow, Lanier & Co. to take the $13,000 mortgage or did they ask you for it?

A. We asked them to buy it.

Q. 3. When was it sent to them?

A. It was sent to them in November, 1879, I think. It was sold to them on the 14th of November, 1879. I do not remember the day on which the mortgage was sent to them, but it was prior to the sale.

Q. 4. How much did you sell it for?

A. We sold it for $13,985.84; that covered one year's interest on the mortgage. We assumed that the proceeds of the other mortgage would pay the other two years' interest. The amount we received from King and Thompson from the $7,000 mortgage—$6,532.72—together, with the proceeds of this note—$13,985.84—with one year's interest, would be sufficient to pay Nash's entire indebtedness to the bank. There was an error in that estimate, however, and it fell short $412.87, which we still hold against him.

Q. 5. Please look at the paper now shown you and state if it contains the account or the items as you made up the $13,985.84. State who wrote this paper "C" exbibit.

A. Why, I can't tell you about this—this is the old bank. I judge it is the handwriting of our book-keeper, Mr. Hollingshead, who was book-keeper of the old bank. I can't tell you whether that is the indebtedness as we bought it or not without reference to our books.

Q. 6. Now, state the account and all the items as you made it out to produce the $13,985.84.

A. This $13.985.84 was credited on the general indebtedness of John Nash & Co.

117 Q. 7. What I ask you for is an account of the bank against Nash—all the items for which you held the two mortgages as collateral. Now, I request you to furnish copies of your correspondence with Winslow, Lanier & Co. concerning the claim of Nash and the securities.

The further taking of depositions adjourned until Thursday, October 13th, 1880, at 2 30 p. m.

The taking of depositions resumed at above hour.

Present: Hon. P. Mallon, of counsel for defendants; Hon. Rufus King for plaintiffs.

A. Here is a copy of the account, marked Exhibit "D," and made part of my deposition, and here is the correspondence between the bank and Winslow, Lanier & Co., relating to the sale of the note,

marked Exhibits "E" and "F," and also made part of this deposition.

Q. 8. When you got the proceeds of the $7,000 mortgage to whom did the same belong—your bank or Winslow, Lanier & Co.?

A. The proceeds of the $7,000.00 mortgage belonged to our bank.

Q. 9. On what did you credit it?

A. On the general indebtedness of John Nash. It is credited on the account here as shown in Exhibit "D."

Q. 10. Then you kept all the notes, the old and the $12,000 note?

A. We kept them all.

Q. 11. And still have them?

A. And still hold them in our possession.

Q. 12. When your bank took all these and other suspended claims from Pendleton and Sherlock as trustees, did you not do it to account for proceeds when collected?

A. We took them absolutely.

Q. 13. Did you pay cash for them?

A. We did; the note was turned over to the new bank,
118 among other good assets, in consideration of the new bank assuming all the liabilities of the old.

Q. 14. Did you tell Winslow, Lanier & Co. that the $13,000 mortgage was collateral to the debts you still held on to?

A. We did not.

Q. 15. What did you tell them?

A. Just what we have got there in the correspondence in Exhibits "E" and "F."

Q. 16. Do you understand that your bank can collect the debt due from Nash, and Winslow Lanier & Co. collect the collaterals?

A. We consider the debt due from Nash as paid by the proceeds of the collaterals, and Winslow, Lanier & Co. collect the collaterals.

Q. 17. Nash debt was all due before you got it, was it not? I do not mean the collaterals.

A. The entire debt was due before we received it.

Q. 18. What is the debt of the overdrafts?

A. I will have it inserted in Exhibit "D."

Q. 19. Was it not unusual for Winslow, Lanier & Co. to take this mortgage without indorsement by you when you had never discounted it?

A. No, not at all unusual to take it under that request of ours. They had been correspondents of the old bank for a great many years, and were correspondents of our bank, which succeeded to the old.

Q. 20. Why did they not return it to you when not paid, as is usual with banks? Did you not know it would not be paid, and did you not request Winslow, Lanier & Co. to sue it, while in the meantime you kept your account good with them?

A. We had guaranteed the collection of it and expected
119 Winslow, Lanier & Co. to reimburse themselves from the collection of the note. They, of course, knew that we — compelled to pay the note if they failed to collect it from Nash under that guaranty. In our balance with them we had no reference to

the proceeds of this note at all. Our balance was more or less with them, just as our needs required. I didn't think it would be paid; I didn't know whether it would or not.

Q. 21. This transaction is so unusual I wish you to state the true spirit of it. Are not Winslow, Lanier & Co. suing this claim for your benefit?

A. Winslow, Lanier & Co. are suing this claim to collect the money they paid for this debt.

Q. 22. Have you not paid them back what they paid for it?

A. We have not.

Q. 23. Have you exhibited all the correspondence from them to you and you to them upon this business?

A. I have exhibited all the correspondence relating to the sale of the note.

Q. 24. You do not answer as to all of this business?

A. There is none of the correspondence here since the maturity of the note.

Q. 25. I wish you to give the correspondence since relative to the note—yours and their letters.

A. I can't give their letters; their letters to us have been lost; I can produce our letters.

Q. 26. What collateral did you have of Nash's old debt and what did you do with them?

A. I think there were two Springfield R. R. bonds of $1,000.00 each; I will describe these things more particularly in Exhibit "D;" the notes of other parties discounted for John Nash, named in Exhibit "D," we have charged up to Nash's account; we hold the bonds and the notes.

120 Q. 27. You never tried to collect the notes by suit?

A. We did not.

Q. 28. Please state what contract you have with Winslow, Lanier & Co. as to the collection of this mortgage.

A. The contract we have with them is shown in that guaranty in Exhibit "E."

Q. 29. Did Winslow, Lanier & Co. ever see Nash or the land, or know whether the mortgage was first or second?

A. I don't know whether they ever did or not.

Q. 30. I wish you now to bring the rest of your letters, and then I wish to examine you on contents of the lost letters.

Depositions adjourned by consent until Friday, October 15th, at 9.30 a. m.

Depositions resumed at the above time.

Present: Judge Mallon, of counsel for defendants, and Mr. Rufus King, for plaintiffs.

A. I have added the dates to Exhibit "D" and also a statement of the collaterals; here are all the letters that I can find; I presume that that is all; these are marked Exhibits "G," "H," "I," and "J," and annexed to this deposition.

Q. 31. Can you state the purport or substance of the lost letters?

A. No; I can't; my replys would indicate as near as might be the purport of the letters, but I couldn't state it.

Q. 32. When you sent the note and mortgage to Winslow, Lanier, & Co., with the statement [that] two years' interest had been paid, Nash had not paid anything in two years and no interest had been paid on the collaterals; is that so?

A. In the statement that two years' interest had been paid it was supposed that enough would be coming from the proceeds of the $7,000.00 mortgage to pay the two years' interest; that was
121 the estimate at the time; but a claim for taxes, I think, subsequently came up, which reduced the amount to this shortage, and also a claim was paid to Mr. Avery for counsel fees by request of Mr. Nash.

Q. 33. You sent to Winslow, Lanier & Co. the letter of Nov. 28th, 1879, did you, and did they do as you requested them?

A. I presume they did.

Q. 34. I wish you now to add to these letters a copy of King, Thompson and Maxwell's letter you sent to Winslow, Lanier & Co.

A. That I am unable to do. I can't find it.

Q. 35. Can you give copy of Sherlock's letter? He was trustee of old bank assets. Is that the reason he wrote?

A. I haven't got a copy of this letter. He did not write because he was trustee. He was one of its directors.

Cross-examination:

Counsel for plaintiffs excepts to each and all of the foregoing interrogatories, answers, and exhibits as not relevant or competent, and, without waiving said exceptions, cross-examines.

X Q. 1. State when and how the guaranty marked Exhibit "E" was sent to the plaintiffs.

A. It was sent on November 12th, 1879, and enclosed in the letter of that date, marked Exhibit "F."

X Q. 2. Is that the statement concerning the two years' interest to which you refer in answer above to the 32nd interrogatory?

A. It is.

X Q. 3. State whether two years' interest had in fact been paid at the time that paper was sent to the plaintiffs.

A. It had not.

X Q. 4. If I understand the transaction, you computed the
122 amount due on Nash's debt with interest at the time you sold the note and mortgage to the plaintiffs, and in estimating what amount was necessary to be raised on the collateral which was sold to them you allowed and deducted as a credit on the entire indebtedness an amount exceeding that which was afterwards received on the $7,000.00 mortgage. Is that the correct version of the matter?

A. It is.

X Q. 5. When were the proceeds of the $7,000.00 mortgage received by the bank and credited?

A. On November 28th, 1879, as shown in Exhibit "D."

The witness, desiring to explain his answer to question 3 in chief, says that the $13,985.84 covered one year's interest on the mortgage, less the discount from that time until maturity.

CHA. B. FOOTE.

The further taking of depositions adjourned by consent until Saturday, October 16th, 1880, at 2.30 p. m.

By consent of both counsel the taking of depositions was not resumed on Saturday, Oct. 16th, 1880, at 2.30 p. m., but the same were adjourned until Tuesday, Oct. 19th, 1880, at 2.30 p. m.

Present at that time: Judge Mallon, on behalf [of] defendants, and Hon. Rufus King, on behalf of plaintiffs.

HUGH COLVILLE recalled:

Q. 1. Did you, as cashier of the bank, soon after the loan of $12,000 was made, offer the two mortgages and the $12,000
123 note to P. E. Roach, and did Roach take them away with the consent of the bank for the purpose of examination and decision whether he would advance the $12,000 and take the same with the collaterals?

Question objected to by plaintiff's counsel as not relevant or competent as against them.

A. When I was cashier of the bank a party that I did not know, who was accompanied by Mr. Nash, came to us and asked the privilege of taking the mortgage that we held as collateral to his attorney, Mr. Paxton, for examination, and that he intimated to me his intention of buying the same, and we gave said mortgage to Mr. Nash with the understanding that they were to be returned to us as soon as his customer was satisfied, and they were returned to us by Mr. Nash, as promised.

Q. 2. What I wish to ask is, did not the bank offer the same to Roach for the $12,000 and the interest on it?

A. He never made any offer to us, and we never made any offer to him that I remember of. There was no proposition made by him to purchase them, only that if he found them to be correct he might purchase them.

Q. 3. And you were to sell them to him?

Same objection by plaintiff as above, and also to preceeding question.

A. When we lent the money to Mr. Nash in the first place we lent it with the understanding that he was to sell these mortgages and reimburse us, and we supposed that this transaction was only carrying out the original agreement.

Q. 4. Have you not stated to Nash, in presence of his attorney, that if Roach had purchased the $12,000 note before maturity you would have given up the mortgages?

Same objection by plaintiffs as heretofore.

124 A. I have said that if the mortgages were sold that they would be delivered to Mr. Nash or the purchaser upon the payment of the loan made to him upon said collaterals.

Q. 5. Will you answer the above question more directly?

Same objection by plaintiffs as above.

A. Probably; yes, I did.

Q. 6. Afterwards did Mrs. Nash and her daughter call on you as cashier and speak about sale of 8th-St. house, and in that connection ask you how much there was against the two collaterals, $13,000 and $7,000 mortgages, and you answered $12,000 or $13,000; is that so? If not, state the conversation.

Same objection by plaintiffs as above.

A. I remember distinctly Mrs. Nash and her daughter calling on me in relation to these mortgages, but as to the conversation that occurred with them I do not remember. It was during my time as cashier of the Commercial Bank.

Cross-examination:

Plaintiffs, not waiving the foregoing objection, now cross-examine.

X Q. 1. Had you any authority from the directors for saying that the mortgages would or could be delivered up without payment of the entire indebtedness due from Mr. Nash to the bank?

A. No, sir.

X Q. 2. Please examine the paper marked Exhibit "C," and state whether it was not furnished to Mrs. Nash by the bank soon after the visit referred to by you in your last answer in chief.

125 I remember furnishing Mrs. Nash with an account of Mr. Nash's indebtedness. I can't say whether this is the one or not. It is in the handwriting of George Strong, who was our bookkeeper at that time.

HUGH COLVILLE.

Depositions adjourned by consent until Wednesday, Oct. 20th, 1880, at 2.30 p. m.

On Wednesday, October 20th, all parties met pursuant to adjournment. There being no witness present, by consent, these depositions were adjourned until Friday, Oct. 22d, 1880, at 10 a. m.

On Friday, Oct. 22d, 1880, at 10 a. m., all parties met pursuant to adjournment. There being no witness present, by consent, these depositions were closed.

In the Circuit Court for the Northern District of Ohio, Western Division.

J. F. D. LANIER *et al.*, Partners as Winslow, Lanier & Co., Plaintiffs,
vs.
JOHN NASH, ELLEN NASH, MORRIS WALSH, *et al.*, Defendants.
No. 163.

STATE OF OHIO,
Southern District of Ohio, County of Hamilton, } ss:

I, Edward J. Dempsey, a notary public in and for the county of Hamilton and State of Ohio, do hereby certify that the depositions of Hugh Colville, Elliott H. Pendleton, Daniel J. O'Connell, and Charles B. Foote were by me, in pursuance of the notice an-
126 nexed hereto, taken at the law office of Mallon and Coffey, No. 6 W. Fourth St., in the city of Cincinnati, county of Hamilton, and State of Ohio; that said depositions were begun on Wednesday, October 6th, 1880, at 2 o'clock p. m.; that they were continued from time to time, as noted in the depositions, and that they were closed on Friday, October 22nd, 1880, at 10 a. m.; that each of said witnesses was by me, before testifying, first cautioned and sworn to speak the truth, the whole truth, and nothing but the truth; that said depositions were by me, in the presence of said witnesses, reduced to writing; that said depositions were by said witnesses respectively signed in my presence; that during the taking of said depositions Hon. Rufus King attended as counsel for the plaintiffs and Hon. P. Mallon as counsel for John Nash, Ellen Nash, Morris Walsh, and Mrs. Mahon, defendants, the said depositions being taken on behalf of said defendants.

I further certify that the reason why the said depositions were taken was that three of said witnesses, viz., Elliott H. Pendleton, Charles B. Foote, and Daniel J. O'Connell, reside in Cincinnati, Ohio, and the fourth, Hugh Colville, resides in the city of Covington, State of Kentucky, each of said places being more than one hundred miles from Toledo, in the State of Ohio, the place of trial of this cause.

I further certify that the cost of this deposition, $15.00, has been paid by John Nash, and that the same is just and reasonable, and, finally, that I am not of kin or counsel to any of the parties to this cause, and in no way interested in the result of the same.

127 In testimony whereof I have hereunto set my hand and official seal, at the city of Cincinnati, in the county of Hamilton and State of Ohio, this 22nd day of October, A. D. 1880.

EDWARD J. DEMPSEY,
Notary Public in and for Hamilton County, State of Ohio.

EXHIBIT "A." Paper referred to by Mr. Pendleton in his deposition—question and answer 36. E. J. D., notary public, H. Co., O.

Decree distributing the money paid by Leon, in substance, as follows:

Purchase-money		7,345
Marshall's costs	12 80	
Commissioners	168 95	
Docket fee	20 00	
Marshall northern dist.	19 20	
Clerk's —	21 95	
Avery's fee	100 00	
Amount paid the bank		912 28
		6,432 72

EXHIBIT "B." Paper referred to by Mr. E. H. Pendleton in his deposition—question and answer 36. E. J. D., notary public, Ham. Co., O.

128

Due Dec. 1	750	Sept. 29, '77	Made by John Nash.
Due M'ch 17	1,000	Jan'y 13, '77	Signed by Dan'l O'Connell.
M'ch 15	12,000	Feb. 10, '77	
June 21	1,500	Apr. 19, '77	
Nov. 26	1,368 75	Sept. 24, '77	Secured by note of D. C. Pierce for same am't, payable to order of John Nash & Co. Endorsed by John Nash, per Dan'l O'Connell.
Dec. 6, '77	283 86	Sept. 4, 1877	Secured by 3 notes of Evens, Clifton & Co. for 94.62 each, payable to John Nash & Co. Endorsed by John Nash & Co. Each note also has on it "Secured by trust mortgage to Wm. Means."
June 23, '77	272 40	Note of F. C. Weir—March 22, '77—endorsed by John Nash.	

EXHIBIT "C." Paper referred to in E. H. Pendleton's deposition—question and answer No. 36. E. J. D., not. pub.

DR. *In account with Commercial Bank, Cincinnati, Ohio.* CR.

John Nash.

J. Nash	1,500	June 21, '77	
"	750	Dec. 1, '77	
	2,250		

John Nash & Co.

J. Nash & Co.	1,000	Me'h 17, '77	
"	12,000	" 15, '77	
J. C. Weir	272 40	June 23, '77	
J. Nash & Co.	283 86	Dec. 6, '77	
"	1,368 75	Nov. 26, '77	
	14,925 01		

129 Overdraft, Nov. 15, '77, $122.45.

Statement:

John Nash	2,250
John Nash & Co	14,925 01
J. Nash, overdraft	6 41
J. Nash & Co., "	122 45
	$17,303.87

Debt due Com. B'k secured by mortgage, either 17,303.87 or 13,000.00.

Debt due Purcell secured by mort. on small *barn*.

EXHIBIT "D." Part of Foote's deposition referred to in question and answer No. 9. E. J. D., notary public.

DR. *In account with Commercial Bank, Cincinnati, Ohio.* CR.

Note John Nash, due Dec. 1, '77..	750		Nov. 14, '79. Proceeds of Nash note sold to Winslow, L. & Co., Nov. 14, 1879...		13,985 84
Int. to Nov. 24, 1879.....	119 33		Amount received from King & Thompson, Nov. 28, 1879.....		6,532 72
		869 33	Balance due Com'l Bank, Nov. 29, '79.....		402 20
Note Jno. Nash, due June 21, '77..	1,500				
Int. to Nov. 24, 1879.....	291 98				
		1,791 98			
Note Jno. Nash & Co., due Nov. 26, '77.....	1,368 75				
Int. to Nov. 24, '79.....	218 40				
		1,587 15			
Note Jno. Nash & Co., due M'ch 17, '77.....	1,000				
Int. to Nov. 24, 1879.....	215 55				
		1,215 55			
Note Jno. Nash & Co., due Dec. 6, '77.....	283 86				
Int. to Nov. 24, 1879.....	44 70				
		328 56			
Note F. C. Weir, due June 23, '77..	272 40				
Int. to Nov. 24, 1879.....	51 03				
		323 43			
130					
Overdraft ac't J. Nash & Co., Nov. 15, 1877		122 45			
Overdraft ac't Jno. Nash, Sept. 29, 1877....		6 41			
Int. on overdraft to Nov. 24, '79.....		18 57			
Counsel fee, C. H. Avery, Nov. 29, 1879....		100			
Note Jno. Nash & Co., due M'ch 15, '77.....	12,000				
Int. to Nov. 14, '79.....	2,557 33				
		14,557 33			
		20,920 76			20,920 76
Nov. 29, '79. Balance due Com'l B'k.....		402 20			

Col-atteral security: 2 bonds Columbus, Springfield & Cint. R. R. Co. of $1,000.00 each, $2,000.

EXHIBIT "E." Part of Foote's deposition. E. J. D., not. pub.

The Commercial Bank of Cincinnati hereby guarantees collection and payment of the note of John Nash to the order of Hugh Colville, dated Dec. 4, 1876, for $13,000, at 3 years, with interest at eight per cent. annually, and the mortgage securing the same, if purchased by Mess. Winslow, Lanier & Co. The first two years' interest has been paid.

(Signed) CHAS. B. FOOTE, *Pres't.*

131 EXHIBIT "F." Foote's deposition. E. J. D., not. pub.

CINCINNATI, O., *Nov.* 12, 1879.

Mess. Winslow, Lanier & Co., New York.

GENTS: I enclose herewith note of John Nash with mortgage, dated Dec. 4th, 1876, at 3 years, with interest at 8 %, for $13,000; the first two years' interest paid.

I will thank you to place this note to the credit of the bank under discount, and oblige—

Yours, very resp'y,

(Signed) CHAS. B. FOOTE, *Pr's't.*

EXHIBIT "G." Foote's deposition. E. J. D., not. pub.

COMMERCIAL BANK, CINCINNATI, O., *Nov.* 28, 1879.

Mess. Winslow, Lanier & Co., New York.

GENTS: I have to ask you to notify John Nash and wife (West Liberty, Logan Co., Ohio) immediately by letter that you hold the note and mortgages for $13,000 and int., requesting payment accordingly at maturity.

In your letter to them please say nothing concerning the first two years' interest, as the sum collected by us from other collections may not prove to be sufficient to pay the entire two years' interest, as it was supposed it would. In case this debt should not be paid
132 at maturity I have further to ask that you do not charge it to our ac., but hold it so that suit can be brought by you if necessary. I enclose a letter to me from our att'ys, King, Thompson & Maxwell, which please read and return to me.

Very respectfully, CHAS. B. FOOTE, *P's.*

EXHIBIT "H." Foote's deposition. E. J. D., not. pub.

CINCINNATI, *Dec.* 3, 1879.

Mess. Winslow, Lanier & Co., New York.

GENT-: I have your favor of 1st inst. It was intended that the guaranty of this bank for the collection and payment of the note of Jno. Nash, dated Dec. 4, 1876, at 3 yrs., with 8 % interest, should continue in full force until the final collection of the debt. This guaranty is hereby confirmed and continued in full force until the final collection of the note. I enclose confirmation from Mr. Sherlock to the same effect.

Very resp't.,

(Signed) CHAS. B. FOOTE, *Pres.*

EXHIBIT "I." Foote's deposition. E. J. D., not. pub.

COMMERCIAL BANK, CINCINNATI, OHIO, *Dec.* 10, 1879.

Mess. Winslow, Lanier & Co., New York.

133 GENT-: I have your favor of 8th inst. inclosing copy of a letter from Mess. Avery & L. Hommedien, attorneys for John

Nash. I shall be obliged if you will reply to Mess. Avery & L. Hommedien, notifying them that unless t-e debt is immediately paid or satisfactorily arranged the note and mortgage will be put in suit by you.

In case suit becomes necessary I will thank you to place the papers in the hands of the Hon. R. P. Ranney, Cleveland, Ohio (unless you prefer other counsel), with instructions [to] bring suit in U. S. circuit court to foreclose the mortgage in your name.

You will please refer Judge Ranney to Mess. King, Thompson & Maxwell, our att'ys, for any information required for the suit.

Of course we bear all the expenses.

Very resp't.,
(Signed) CHAS. B. FOOTE, *Pres.*

EXHIBIT "J." Foote's deposition. E. J. D., not. pub.

COMMERCIAL BANK, CINCINNATI, O., *Feb.* 20, 1880.

Mess. Winslow, Lanier & Co., New York.

GENT-: Your favor of the 19th inst. is at hand. I will thank you to send the note and mortgage of John Nash to Judge Ranney, of Cleveland, in accordance with the terms of my letter of the 10th Dec.

Very resp't.,
(Signed) CHAS. B. FOOTE, *Pres't.*

134 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

J. F. D. LANIER, CHAS. LANIER, JOHN W. ELLIS, EDWARD D. Adams, Edward Winslow, and Daniel B. Safford, Partners under the Firm Name of Winslow, Lanier & Co., Complainants,

vs.

JOHN NASH, ELLEN NASH, EDWARD PURCELL, WILLIAM H. WEST, James Walker, Wm. A. West, James Kernan, James Kernan, Jr., Mariah Marquis and Elmira Marquis, Partners under the firm name of M. & E. Marquis; Wm. Goodrich, Dennis Madigan, and A. E. Burkhardt & Co., Defendants.

The complainants will take notice that the defendants, John Nash and Ellen Nash and Walsh and Mahon, will, on the 3rd day of March, 1881, between the hours of 9 o'clock a. m. and 9 o'clock p. m. of said day, take the depositions of John Nash and Ellen Nash at the residence of the said John Nash, in Monroe township, Logan county, Ohio, situate about one mile east of the village of West Liberty, in said county, continuing the taking thereof, if necessary, from day to day, between the same hours, until completed, which depositions are to be used as evidence on the trial of the above cause, the said witnesses living more than one hundred miles from Toledo, in the State of Ohio, the place of trial.

Dated this 22nd day of February, 1881.

WM. H. WEST AND
JAMES KERNAN AND P. MALLON,
Att'ys for John Nash and Ellen Nash.

135 P. MALLON,
Att'y for Walch and Mahone.

Service of the foregoing notice acknowledged this 23rd day of February, 1881.

R. P. RANNEY,
For Comp'ts.

Depositions of Ellen Nash and John Nash, taken in pursuance of the annexed notice, on their own behalf, at their residence, near West Liberty, Logan county, Ohio, on M'ch 3rd, 1881.

Present: Judge P. Mallon, counsel for defendants, and G. K. Thompson, counsel for plaintiffs.

ELLEN NASH, of lawful age, being be me duly cautioned and sworn, deposes and says as follows:

Q. 1. Are you the Ellen Nash defendant in this suit, and where do you live?

A. I am; reside in Logan county.

Q. 2. Are you the owner of the farm on which you reside? If so, how long have you lived there?

A. I am the owner; have lived here since 1862.

Q. 3. Did you make a mortgage for $13,000 on the farm and one for $7,000 on a house in Cincinnati? If so, state for what you made these mortagages—state all about them, and what was done with them, and what you received for them?

A. Yes; I made the mortgages referred to—made those mortgages for Mr. Nash to raise money to pay an iron debt. These mortgages were given to the Commercial Bank; Mr. Nash got the money for them; rec'd $12,000 for them.

Q. 4. Have you ever had or made any bargain with the Com'l Bank about these mortgages?

136 A. I have not.

Q. 5. Have you ever paid the bank interest on them?

A. I have not.

Q. 6. Had you any interest in your husband's business of John Nash & Co.?

A. No, sir.

Q. 7. When did you first call upon the Commercial Bank about these mortgages, and what was then said about them?

A. Before the Eighth-street property was sold I saw Mr. Colville, who was cashier of the Commercial Bank at that time. I told him we had an opportunity of selling the property, and told him the amount I was to get for it, $8,550.00. He said he was very glad, as that would leave very little for use on my farm.

Q. 8. Please state if you again called at the bank about the mortgages. If so, state what was said.

A. Yes, sir; I did; we were speaking of the mortgages; he said he gave my husband $12,000.00; he said when I got the 8th-street property sold and paid into the bank the bank would give me a little more time on it.

Q. 9. Did the bank ever claim to you they held the mortgages for John Nash & Co.'s account in the bank?

A. No, sir.

Q. 9½. How long did John Nash & Co. continue business after you made the mortgages?

A. I think about two years.

Q. 10. Had you any interest in, or anything to do with, the business?

A. No, sir.

Q. 11. State more clearly what the mortgages were made for—that is, what use of the money obtained on them.

A. Mr. Nash was in debt to the iron company; he wished
137 to pay them off; the money was used for that.

Q. 12. When did you first hear of the present claim of the bank to charge up $20,000—about—against the mortgages?

A. I heard it a short time before the 8th-street property was sold from Mr. King, att'y of the bank. He told me the bank would hold my mortgages for some notes that Mr. Nash had in the bank long before the mortgages were given. I told Mr. King I did not know how that could be done, as I knew nothing of them and had nothing to do with them, and the property was received.

(Question and answer 12 objected to by pl'ffs' counsel for irrelevancy and incompetency.)

Q. 13. Had Mr. King at the time the papers and business managing for the bank?

A. Yes, sir; at that time.

Objected to as above.

Q. 14. Can you state about when this was?

A. I don't remember, only just before the 8th-street — was sold.

(Objected to as above.)

Q. 15. Please state if the bank ever asked you to pay interest on these mortgage notes or made any claim upon them in any way before John Nash & Co.'s assignment.

A. No, sir.

Question by attorney for Walsh and Mahon:

Did you and your husband, John Nash, make a mortgage to Edward Purcell, the same presented in this case by Walsh and Mahon, and is the indorsement of "Edward Purcell" on the note and mortgage for transfer in the handwriting of Edward Purcell, and is said mortgage unpaid?

A. Yes.

138 Cross-examination:

X Q. 1. State whether or not you took the notes and mortgages referred to in your examination-in-chief to the Commercial Bank after their execution; and, if not, state if you know who took them there.

A. I did not. I believe my husband or Daniel O'Connell did. I do not remember which.

X Q. 2. Had you personally ever had any business transactions

with the Commercial Bank previous to the time said notes and mortgages were given to the bank?

A. No, sir; I had not.

X Q. 3. In your answers Nos. 7 and 8 of your examination-in-chief you speak of calling at the Commercial Bank in reference to the mortgages; please state whether or not you had any communion with any of the bank officials other than Mr. Colville.

A. No, sir; I had not.

X Q. 4. In answer to question 10 of your examination-in-chief you say you had no interest in or anything to do with the business of John Nash & Co. Will you please state whether or not you had any personal knowledge of the state of the accounts of John Nash or John Nash & Co. with the Commercial Bank, particularly as to their indebtedness to said bank?

A. No, sir; I knew nothing of it.

X Q. 5. State whether or not you have any personal knowledge of the amount loaned to your husband, John Nash, upon the security of the two mortgages, and what disposition was made of the money so loaned.

A. No, sir; I have no personal knowledge on the subject.

ELLEN NASH.

139 JOHN NASH, of lawful age, being by me first duly cautioned and sworn, deposes and says as follows:

Q. 1. State your former business and relations with the Commercial Bank of Cincinnati down to your assignment—your account with bank, and how it run.

A. I was a general depositor of money in the Commercial Bank from 1858 until Jan'y, 1878—depositing money and checking it out. I done a large manufacturing business; it principally constituted car-wheels and railroad castings, which at times run from $25,000 to $30,000 *dollars* a month; my collections and notes were always deposited at the Commercial Bank, and cash balances in my favor at the bank—sometimes as high as $25,000 *dollars*.

Question objected to by plaintiffs.

Q. 2. Please state your account with the bank when you got the mortgage loan, and how it run then, down to the assignment.

A. Account run as it did previously—depositing money one day and checking it out as business required it; made collections and deposited them in the bank and had notes discounted.

Objected to as above.

Q. 3. Please state, now, the transaction and contract of the mortgage loan when you left your wife's mortgages.

A. Nov. 18th, 1876, I called on Mr. Colville, cashier of the Commercial Bank; I asked him, saying: Hugh, do you think I could make a temporary loan of $10,000.00 or $11,000.00 *dollars* for 60 or 90 days, of which I will give you or the bank ample collateral

140 security, because I have a proposition from some iron men with whom I am considerably in arrears with iron bills for

the years 1874 & '5. They propose, if I pay them a certain amount of cash down, they will give me a clear receipt for the account held against me. Mr. Colville says he will lay the matter before the board of directors and let me know in a week or ten days. I seen him within that time. He told me they would make the temporary loan, as I was one of their oldest customers, though they were not, he said, in the habit of taking any mortgage security for loans. My representing to them that I had a promise from parties that would take those securities left with them as collateral and pay them back that loan, Mr. Colville said that on that representation I could have the loan for 60 days. On the 4th of December, 1876, I went to the Commercial Bank with two mortgages, $13,000.00 and $7,000.00, [and] made a note of 60 days for $12,000.00. Mr. Pendleton, the president of the bank, objected to making the loan $12,000.00, as I represented I only wanted $10,000.00 or $11,000.00. He, however, loaned me $12,000.00, less the interest, for 60 days, on my representing certain other claims which I did not know of at the time I asked for the $10,000.00 or $11,000.00 *dolls.*

(Question and answer objected to.)

Q. 4. For what did you pledge the two mortgages?
A. For $12,000.00.

(Question and answer objected to.)

Q. 5. Did you so tell Mrs. Nash?
A. I did, sir. I told Mrs. Nash there was only $12,000 *dollars* borrowed on the two mortgages of $13,000 and $7,000.00.

(Question and answer 5 objected to for incompetency.)

141 Q. 6. When you gave the note for $12,000, how much money did you get?
A. I got the proceeds of the $12,000.00, less 63 days' interest at 8 per cent.

(Question and answer objected to.)

Q. 7. Did the bank wish you to get some one to take the $12,000 loan off their hands? Tell about that.
A. I told the bank at the time the $12,000.00 note was given that a personal acquaintance of mine, Mr. Roach, would take up that loan of $12,000.00 and take the mortgage security that the bank held. Mr. Roach and myself went into the Commercial Bank; saw Mr. Pendleton, the president of the bank, before the note matured. Mr. Pendleton or Mr. Colville, I don't know which, gave us the mortgages to have them examined by Roach's attorney, Mr. Paxton. He reported them all right, and we returned them to the bank. When Mr. Roach and myself went back with the mortgages Mr. Pendleton remarked to Mr. Roach that he wished he would take up that note and them mortgages, as they had scarcely made any loans on real estate or country property mortgages, but as John Nash had been an

old customer of theirs they did make that temporary loan to assist him through.

(Question and answer objected to.)

Q. 8. State now about the old account or account you had with the bank when you made the loan [of] $12,000 and the collaterals the bank had for the old account and what became of the collaterals.

142 *Q. 8.* The old ac'p't of John Nash and John Nash & Co. had been running since 1874 & '5 and were constituted by John Nash & Co. getting business men's notes discounted at Commercial Bank; when them notes come due the parties who made them were not able to take them up, and John Nash & Co. gave their notes, attaching these notes as collateral security, renewing them from time to time and paying the interest thereon, always attaching these collateral securities. The securities were John Nash's individual note and two Springfield and Columbus bonds of $1,000 each, drawing 7 per cent. interest, interest payable semi-annually. The collateral securities of John Nash & Co.'s indebtedness were the notes of D. C. Pearce, Evans, Clifton & Co., and L. C. Weir. The amount of D. C. Pearce's note, $1,368.73; Evans, Clifton & Co.'s notes, three of them of $94.62 each, secured by real estate mortgage; L. C. Weir's note, $272.40. All these collaterals are now held by the Commercial Bank.

(Question and answer objected to.)

Q. 9. Have they collected them?

A. I don't know; they have never reported to me or the assignee.

(Question and answer objected to.)

Q. 10. Did the bank make any claim to hold Mrs. Nash's mortgages for these other accounts before your assignment?

A. No, sir.

(Question and answer objected to.)

Q. 11. How about the loan as $12,000 or $13,000; there seems some difference; can you explain?

A. After the loan of $12,000.00 and the proceeds paid to the iron men, I told Mr. Colville, the cashier of the bank, that I had a contract where I wanted to use $1,000.00 and asked him if I could

143 borrow a $1,000.00 for 60 days; he said he guessed so; had the note made and the proceeds placed to my credit in the bank; I paid the note when it became due; in my absence form Cincinnati D. J. O'Connell, my book-keeper, made a note to the Commercial Bank of $1,006.00, which I find by a statement of the Commercial Bank has not been paid; that, added to the $12,000.00, makes the $13,000.00.

(Question and answer objected to.)

Q. 12. Did you agree or consent that the bank should hold your wife's notes and mortgages for any of the old debt?

A. No, sir; I did not.

(Question and answer objected to.)

Q. 13. State now what Colville told you about this matter—I mean this mortgage claim.

A. Mr. Colville told me in the presence of Mr. Rufus King and Charles B. Foote, president, and at another time in the presence of Judge Mallon, Winslow, Lanier & Co. were not the *bona fide* owners of this mortgage paper, and during his whole term as cashier he never had a transaction of that kind with Winslow, Lanier & Co., nor did he ever believe they ever dealt any in mortgage securities; he said he was part owner of this claim, and if the Commercial Bank received any money for the sale of this mortgage paper he was entitled to a portion of it; Mr. Colvill- further told me that at any time during his being cashier of the bank he would at any time deliver up to me, or anybody paying the $12,000.00 loaned by them, the notes and mortgages.

(Question and answer objected to.)

Q. 14. Did the bank ever return to you the $12,000 note?

144 A. No, sir.

(Question and answer objected to.)

Q. 15. Look over the bank account, paper "B," in the other deposition; state what interest is charged and state also what, if any, part of the account is covered by the mortgages of Mrs. Nash.

A. Interest charged at 8 per cent. on all suspended ac'*p*'ts; only $12,000.00 of the accounts is covered by the mortgages; other ac'*p*'ts have other collaterals.

(Question and answer objected to.)

Q. 16. Please look at account "D," in the other deposition, and state what of that account is covered by the mortgages and how much has been paid on the mortgages.

A. All that the mortgages secures of this account is $12,000.00, and a credit on the sale of the 8th-street property to these mortgages is $6,532.72; this account is correct, I believe, as to dates.

(Question and answer objected to.)

Q. 17. How should the $12,000.00 loan be counted as to amount now due?

A. It should be counted $12,000.00 from March 15, 1877, at six per cent. interest less the credit by the sale of the 8th-street property, made Nov. 28th, 1879, at $6,532.72.

(Question and answer objected to.)

Q. 18. State if Geo. H. Hill was president of the bank and when and what he said to you about this claim when president.

A. George H. Hill was president of the Commercial Bank up to July 1st, 1878; I think some time in the spring of 1878, in April or May, I met Geo. H. Hill on the street; he asked me to come down to the Commercial Bank, take up the old accounts of John
145 Nash & Co., make new notes for all of them, and pledge the mortgages made by Mrs. Nash for $7,000 and $13,000.00 for the security of these claims; I told him, No; I would not; that they already had collaterals attached to them.

(Question and answer objected to.)

Q. 19. In Colville's deposition he, Colville, says, "When we lent the money to Mr. Nash in the first place we lent it with the understanding that he was to sell these mortgages and reimburse us," &c. Now, state fully the agreement with the bank, and whether it was ever changed.

A. The understanding with the bank at the time the $12,000.00 loan was made — that I was to sell the mortgages and reimburse them the $12,000.00 loaned me as an accommodation, and there was no conversation, implied or otherwise, that the mortgages were held by the Commercial Bank for other than the $12,000.00. It never was changed, nor did Mr. Pendleton or Mr. Colville ever mention to me anything about the suspended ac'p'ts of John Nash & Co. prior to this loan.

(Question and answer objected to.)

Q. 20. When did you make an assignment, and have you paid anything since?

A. I made the assignment January 18th, 1878. I have paid nothing on them since.

(Question and answer objected to.)

Q. 21. Did the bank ever claim of you to pay interest on the mortgage notes, and did you ever pay any?

A. No, sir, never did, and never paid any.

(Question and answer objected to.)

Q. 22. Did Mrs. Nash have anything to do with your business, and had she anything to do with the items in the account
146 "D" spoken of except the $12,000, and had she any knowledge of any of these items or transactions?

A. She had nothing to do with my business. She had nothing to do with the items in the ac'p't "D" other than the $12,000.00. The other items she never knew anything about them.

(Question and answer objected to.)

Q. 23. Which of the other items are older than the mortgages, and which have been made since?

A. Those made since, $122.45; overdraft of John Nash & Co., $18.57; interest on overdraft on John Nash & Co., $6.41; overdraft of John Nash, note of $1,000.00, signed by D. J. O'Connell. All the

other items are prior to the $12,000.00 notes. Dates given in account "D," I believe, are correct to the best of my belief.

(Question and answer objected to.)

Counsel for plaintiffs objects to all of the questions and answers in the foregoing deposition of John Nash on the ground of their incompetency and irrelevancy as against this plaintiff, and without waiving said objections now cross-examines.

Cross-examination:

X Q. 1. In the letter part of answer 3 in your examination-in-chief you say Mr. Pendleton loaned you $12,000, less the interest for 60 days, upon your representing certain other claims which you did not know of at the time you asked for the $10,000.00 or $11,000. Please state what claims you refer to in that answer.

A. They were bills for labor, principally due the moulders and hands about the foundry; that is the reason I asked Mr. Pendleton to increase it to $12,000.

147 X Q. 2. State, if you can, the date of the $1,000 *dollar* loan, made to D. J. O'Connell for you by the Commercial Bank, to which you have testified in answer 11 of your direct examination.

A. I can only state it from the statement of the Commercial Bank in Exhibit "B," which is dated Jan'y 13th, 1877.

X Q. 3. To what exhibit do you refer?

A. I refer to Exhibit "B," attached to E. H. Pendleton's deposition in this case, taken October 22nd, 1880.

X Q. 4. Look at answer No. 13 of your direct examination, and tell me when you had the conversation with Mr. Colville in presence of Mess. Rufus King and Charles B. Foote, and with Mr. Colville in presence of Judge Mallon, to which you there testify. I want to know the dates of each conversation.

A. The conversation with Mr. Colville in the presence of Mr. King and Mr. Foote, in the Commercial Bank, was in August or September, 1880—I can't tell the exact date—and the conversation with Colville at his office in the presence of Judge Mallon was in September, 1880.

[X] Q. 5. State, if you know, whether or not Mr. Colville was an officer or employee of the Commercial Bank at the time the said conversations took place.

A. I don't think he was, but his conversation and his statement to me had reference to the time he was cashier.

[X] Q. 6. State when and from whom you first heard that Winslow, Lanier & Co. held the $13,000 note and mortgage now in suit in this case.

A. Heard of it by letter from Winslow, Lanier & Co., which letter was dated Dec. 1st or 2nd, 1879. I have not the letter in my possession. I gave it to Mr. E. H. Avery to answer it.

148 [X] Q. 7. Did Winslow, Lanier & Co., in that letter, claim

to be the *bona fide* owners of the note and mortgage sued [on] in this case?

A. I don't recollect.

Counsel for defendants objects to the above question and answer.

JOHN NASH.

In the United States Circuit Court for the Northern District of Ohio, Western Division.

LANIER *et al.*, Pl'ffs, *vs.* JOHN NASH *et al.*, Def'ts. } No. 163.

STATE OF OHIO, *Logan County*, } *ss:*

I, George F. Bailey, a justice of the peace in and for said county and State, do hereby certify that the depositions of John Nash and Ellen Nash were by me, in pursuance of the notice hereto annexed, taken at the residence of said John Nash and Ellen Nash, near West Liberty, Logan county, Ohio, on March 3rd, 1881; that each of said witnesses was by me, before testifying, first cautioned and sworn to speak the truth, the whole truth, and nothing but the truth; that said depositions were by me, in the presence of said witnesses, reduced to writing; that said depositions were by said witnesses, respectively, signed in my presence, and that during the taking of said depositions Judge P. Mallon attended as counsel for defendants;

149 G. K. Thompson, counsel for plaintiffs. The said depositions were taken on behalf of defendants. I further certify that the cost of this deposition, $3.25, has been paid by John Nash, and that the same is just and reasonable. And, finally, that I am not of kin or counsel to any of the parties to this cause, nor am I interested in the result of the same.

In testimony whereof I have hereunto set my hand and official seal at West Liberty, Logan county, Ohio, this 3rd day of March, 1881.

GEO. F. BAILEY, [SEAL.]
Justice of the Peace in and for Logan County, Ohio.

And afterwards, to wit, on the 29th day of September, being a day of the June term, A. D. 1883, the Honorable John Baxter, presiding, the following decree was entered in this cause in this court, being in the words and figures —, to wit:

Decree.

Decree and Order of Sale.

United States Circuit Court, Northern District of Ohio, Western Division. In Chancery.

J. F. D. LANIER *et al vs.* JOHN NASH *et al.*

This cause came on to be further heard upon the bill, the an-

swers, and cross-bills, replications, exhibits, and testimony, and was argued by counsel of the parties. The court thereupon find that the mortgage of the lands described in the bill and situated in
150 Logan county, Ohio, and district aforesaid was duly executed, acknowledged, and delivered by the defendants, Ellen Nash, otherwise called and known as Nellie Nash, and John Nash, her husband, to Hugh Colville, and was duly recorded on the 11th day of Dec., A. D. 1876, in the recorder's office of said county, the said land being then owned by the said Ellen Nash.

The court further find that the said mortgage and the note for thirteen thousand ($13,000) dollars, which is thereby recited and secured, was delivered to said Hugh Colville, together with another mortgage for $7,000, made to him as trustee by said Nash and wife, upon certain real estate in the city of Cincinnati, Ohio, which was also owned by said Ellen Nash, and that the said two mortgages were intended and delivered only as security for the loan and advances of the thirteen thousand dollars, which was paid in cash to the said John Nash by the Commercial Bank of Cincinnati upon the delivery of said notes and mortgages to the said Hugh Colville, he then being cashier of said bank.

The court further find that by the foreclosure of said mortgage for $7,000 the said bank, on the 28th day of November, 1879, collected and received the sum of $6,432.72, and that the same is to be credited as a payment of that date on said loan of $13,000 so advanced.

The court further find that on the 14th day of November, A. D. 1879, the said Commercial Bank of Cincinnati sold and transferred the said note and mortgage for $13,000, which are described in the bill to the complainants, but the court find that the alleged
151 purchase was a mere device by which the Commercial Bank could collect through complainants; that the sale was in contemplation of a court of equity, and in fact an arrangement for the purpose of collection, and if, in fact, anything more was intended, the circumstances attending and connected with the sale were sufficient to have put the complainants on inquiry, and they consequently acquired no other or greater right than was possessed by the bank, from whom they derived their title.

The court therefore find that, after deducting said payment of $6,432.72, the sum of twelve thousand six hundred and fifty-eight $\frac{4}{100}$ ($12,658.04) and no more is due to the complainants upon the note and mortgage which is set up in their bill, including interest at eight per cent. per annum to the date of entering this decree, as stipulated in said note and mortgage and allowed by statute upon agreement, and that for the payment of said sum, with interest thereon at the same rate of eight per cent. per annum, and all costs in this cause, the complainants have the prior and paramount lien upon the lands so mortgaged, and are entitled to a decree accordingly.

The court further find that the mortgage set forth and described in the answer and cross-bill of Walsh and Mahon was executed and

delivered by Ellen Nash, also called and known as Nellie Nash, and John Nash, her husband, to Edward Purcell, who assigned and transferred said mortgage to Walsh and Mahon, as set forth in the answer of said Walsh and Mahon, and upon the lands in the said answer described, part of the lands in the bill described, and the separate property of the said Ellen Nash, and that there is now
152 due from Ellen Nash to said Maurice Walsh and Johanna Mahon upon said mortgage debt the sum of $7,414.33, with interest from Oct. 1st, 1883, at the rate of 7 per cent. per annum, as per contract, which sum is a lien upon the lands in the said answer of Walsh and Mahon described.

It is therefore ordered, adjudged, and decreed that the said Ellen Nash, or some one for her, within thirty days, pay to the said complainants, or R. P. Ranney, their solicitor, said sum of $12,658.04, with interest as aforesaid, and the costs of this case, and, in default of such payment, that an order of sale issue to the marshall of this northern district of Ohio, commanding him to sell, as upon execution in Ohio, the lands in the bill of complaint mentioned and described.

It is further ordered, adjudged, and decreed that the said Ellen Nash, or some one for her, within thirty days, pay to Walsh and Mahon aforesaid, or to Mallon and Coffey, their solicitors, the sum of $7,414.33, with interest as aforesaid at 7 per cent. per annum, and the costs of this action remaining unpaid, and that, in default thereof, *that* an order of sale issue to the marshal of this northern district of Ohio, commanding [him] to sell, as upon execution in Ohio, the lands in the answer of Walsh and Mahon described, portion of the lands in the bill of complaint described.

It is further ordered, adjudged, and decreed that the marshal, in making sales under this decree, for the purpose of preserving the separate liens for proper distribution hereafter, shall first sell the lands upon which Walsh and Mahon have no lien, and to this end
153 and to obtain the best price the said marshal is authorized to subdivide said lands into such size tracts or parcels best suited to the market, and to appraise and sell the same accordingly, and to report his proceedings under such order of sale to this court for further order in the premises.

And this cause came on to be heard further upon the answers and cross-bills of the defendants, Maria Marquis and Elvina Marquis, and William H. West, James Walker, William A. West, James Kernan and James Kernan, Jr., and William Goodrich, and it appearing to the court that there is due from the defendant, Ellen Nash, to the said Maria Marquis and Elvina Marquis, jointly, the sum of one hundred eighty-six and $\frac{13}{100}$ dollars by virtue of a judgment of the district court of Logan county, Ohio, and that the same is a lien upon the separate estate of said Ellen Nash, in said county, from the 14th day of April, 1877; and it further appearing to the court that there is due from the defendants, John Nash and Ellen Nash, to the said William H. West, James Walker, and William A. West, jointly, the sum of three hundred and sixty-four and $\frac{50}{100}$ dollars, and for which they have a lien upon the lands, in said county, of

said defendants from the 10th day of November, A. D. 1879, by virtue of the mortgage set forth in their answer; and it further appearing to the court that there is due from said John Nash and Ellen Nash to the said James Kernan and James Kernan, Jr., jointly, the sum of seven hundred and twenty-nine dollars, and for which they have a lien upon the lands of said defendants from the 10th
154 day of November, 1879, by virtue of the mortgage set forth in their answer; and it further appearing that there is due from John Nash and Ellen Nash to the defendant, William Goodrich, the sum of one thousand and nineteen and $\frac{85}{100}$ dollars, by virtue of a judgment of the court of common pleas of Logan county, Ohio, and the same is a lien upon the real property of said John and Ellen Nash in said county from the 19th day of October, 1880; and it is, therefore, ordered that said John Nash and Ellen Nash pay to said several named defendants the sums so as aforesaid found due within ten days, in default of which that there be paid to said several named defendants out of the proceeds of the sale hereinbefore provided for, after satisfying the liens and amounts hereinbefore specified, to the complainants and to the defendants, Maurice Walsh and Johanna Mahon, the said several sums so last above found due the defendants, in the order and priority of liens as above named.

And, thereupon, the said complainants give notice of appeal from the foregoing decree, and the court fix the amount of the appeal bond at the sum of $500.

155 Know all men by these presents that we, J. F. D. Lanier, Charles Lanier, John W. Ellis, Edward D. Adams, Edward Winslow, and D. B. Safford, partners as Winslow, Lanier & Co., as principal, and Thomas Sherlock and Joseph N. Kenney, as sureties, are held and firmly bound unto John Nash, Ellen Nash, Edward Purcell, Maurice Walsh, Johanna Mahon, William H. West, William A. West, James Walker, James Kernan, Jr., Maria Marquis, Elvina Marquis, [and] William Goodrich in the sum of five hundred dollars; to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 20th day of October, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas the above-bounden Winslow, Lanier and Company, as above individually specified as partners doing business, &c., have appealed to the next Supreme Court of the United States from a decree of the circuit court court of the United States for the northern district of Ohio, bearing date the 29th day of September, A. D. 1883, in a cause wherein the said Winslow, Lanier & Company were complainants and the said John Nash, Ellen Nash, Edward Purcell, Maurice Walsh, Johanna Mahon, William H. West, William A. West, James Walker, James Kernan, Jr., Maria Marquis, Elvina Marquis, and William Goodrich were respondents: .

Now, therefore, the condition of this obligation is such that if the above-named appellants, Winslow, Lanier & Company, shall prosecute their appeal with effect, and pay all such such damages, costs, and expenses as shall be awarded against them as such appellant therein, then this obligation to be void; otherwise to remain in full force and effect.

ESTATE OF J. F. D. LANIER, DECEASED,
P'r CHARLES LANIER, [SEAL.]
Executor.
CHARLES LANIER. [SEAL.]
JOHN W. ELLIS. [SEAL.]
EDWARD D. ADAMS, [SEAL.]
By EDWARD WINSLOW, *Att'y.*
EDWARD WINSLOW, [SEAL.]
D. B. SAFFORD. [SEAL.]
THOMAS SHERLOCK. [SEAL.]
JOS. N. KINNEY. [SEAL.]

Signed, sealed, and delivered by Sherlock & Kinney in presence of—

RUFUS KING.

Sealed and delivered in presence of—

GEO. S. JONES.

[Endorsed:] No. 163. In the circuit court of the United States for the northern district of Ohio. Winslow, Lanier & Co. *vs.* John Nash *et al.* Appeal bond. Approved and filed October 26th, 1883. M. Welker, judge.

156 *Certificate.*

UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division, } *ss:*

I, Augustus J. Ricks, clerk of the circuit court of the United States for said district and western division, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein J. F. D. Lanier, Charles Lanier, John W. Ellis, Edward D. Adams, Edward Winslow, and Daniel B. Safford, partners under the firm-name of Winslow, Lanier & Company, are the complainants, and John Nash, Ellen Nash, Edward Purcell, William H. West, James Walker, William A. West, James Kernan, James Kernan, Jr., Mariah Marquis and Elmira Marquis, partners under the firm-name of M. & E. Marquis; William Goodrich, Dennis Madigan, Maurice Walsh, and Johanna Mahon, as assignors of the mortgage made to Edward Purcell and A. E. Burkhardt & Company, are the defendants, as the same appears from the files and records of said court now remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed

the seal of said court, at my office, in Toledo, in said district, this 26th day of October, A. D. 1883, and in the 108th year of the Independence of the United States of America.

[Seal of the Circuit Court, North'n Dist. of Ohio.]

AUGUSTUS J. RICKS, *Clerk.*

Endorsed on cover: N. Ohio C. C. U. S. No. 200. J. F. D. Lanier, Charles Lanier, John W. Ellis, Edward D. Adams, Edward Winslow, & D. B. Safford, partners as Winslow, Lanier & Co., appellants, *vs.* John Nash, Ellen Nash, Edward Purcell, William H. West, James Walker, *et al.* Filed 1st November, 1883.

UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division:

I, Augustus J. Ricks, clerk of the circuit court of the United States in and for said district, do hereby certify that in pursuance of the order in the accompanying writ I have diligently searched the files, records, and proceedings of said court in the cause therein named to find the omissions from the transcript of record of the proceedings of said cause named in said writ, and do hereby certify that the copy of the note for $13,000.00, made by John Nash on December 4th, 1876, payable to the order of Hugh Colville, and the copy of the mortgage to secure the payment of the same, made of even date, both hereto attached, is the only note and mortgage referred to in the said writ that can be found in said record and proceedings. I further certify that the note for $12,000.00, referred to in said writ, is lost or misplaced and cannot be found, and that the copy of the said note and mortgage herewith returned is a part of the record and proceedings of the cause in which Winslow, Lanier and Company were complainants and John Nash, Ellen Nash, Edward Purcell, *et al.* were defendants, as the same appears from the original now on file and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Toledo, in said district, this 8th day of November, A. D. 1886, and the 111th year of the Independence of the United States of America.

[Seal of the Circuit Court, North'n Dist. of Ohio.]

AUGUSTUS J. RICKS, *Clerk.*

THE UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the judges of the circuit court of the United States for the northern district of Ohio, Greeting:

Whereas in a certain suit in said circuit court between J. F. D. Lanier, Charles Lanier, John W. Ellis, Edward D. Adams, Edward Winslow, and Daniel B. Safford, partners under the firm name of Winslow, Lanier and Company, complainants, and John Nash, Ellen Nash, Edward Purcell, *et al.*, defendants, which suit was removed to the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"The transcript of record on file in this court fails to contain the following material papers, viz: The note for twelve thousand dollars ($12,000.00) executed by John Nash to the Commercial Bank of Cincinnati on the 4th day of December, 1876, due sixty days after the date thereof and discounted by the Commercial Bank of Cincinnati, the same being the principal debt, for the eventual payment of which the other two notes and mortgages in the transcript of record mentioned were executed and delivered to the said Commercial Bank of Cincinnati, viz: One note executed by John

Nash to Hugh Colville, cashier of the said Commercial Bank of Cinnati, on the 4th day of December, 1876, for the sum of seven thousand dollars ($7,000.00), due three years after the date thereof, the payment of which was secured by a mortgage of even date, executed by John Nash and Ellen Nash, his wife, upon certain real estate in Cincinnati, Hamilton county, Ohio, the property of the said Ellen Nash, and described on pages 35–6 of the transcript of record, and the other executed by John Nash to Hugh Colville, cashier aforesaid of said bank aforesaid, on the 4th day of December, in the year 1876, for the sum of thirteen thousand dollars ($13,000,000), due three years next after the date thereof, the payment of which was secured by a mortgage of even date, executed by John Nash and Ellen Nash, his wife, to said Colville, cashier as aforesaid of said bank, upon certain real estate in Logan Co., Ohio, the property of the said Ellen Nash, and described in the bill of complaint of appellants on pages 1, 2, 3 of the transcript of record. And the transcript of record herein also fails to contain the said last-mentioned note and mortgage or either thereof."

You, therefore, are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 26th day of October, A. D. 1886.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

$13,000.00. CINCINNATI, *December 4th*, 1876.

Three years after date I promise to pay to the order of Hugh Colville thirteen thousand dollars, payable at the Commercial Bank, value received, with int. at eight per cent. per annum, int. payable semi-annually.

Due Dec. 7th, '79.

No. —. JOHN NASH.

On the back of the above note is the following indorsement: "Hugh Colville."

Know all men by these presents that John Nash and Ellen Nash, his wife, of Logan county, Ohio, in consideration of thirteen thousand dollars ($13,000.00) to them paid by Hugh Colville, of Cincinnati, Hamilton county, Ohio, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey to the said Hugh Colville, his heirs and assigns, forever, the following-described real estate, to wit: Lot No. one (1), as surveyed by A. A. Harbison, county surveyor, on the 25 and 26 days of July, 1845, beginning at a stone in the West Liberty road, corner sections 21, 22, 27, & 28; thence east, with the north line of sec. 21, 320 poles to the corner of sec. 21 and 15; thence, in continuation of said line, 66 poles, making in all

386 poles, to a pile of stone in dry channel of creek crossing Otter creek at 42 poles and Urbana and Zanesfield road at 252 poles; thence south 63½ west 121 poles to a stone in edge of the pra-rie 129 links S. to 62 W. from a burr oak crossing Mackacheek creek several times; thence south 1¼° west 48 poles 7 links to a stone on bank of creek crossing creek at 8½ and 12 poles; thence south 31° west 32 poles 9 links to a stone crossing creek at 1½ and 6½ poles; thence west 262.5 poles to a stone in west line of sec. 21; thence with said line north 130 poles 7 links to beginning, containing two hundred [and] forty-four acres and $\frac{15}{100}$ of an acre. South part of section No. 16, T. 5, R. 13, M. R. S., as follows: Beginning at S. W. corner of said section at a post in a pra-rie; thence N. 2° E. 126 poles to a stone, Venita R. Runkle's southwest corner; thence north 88½° east 101.2 poles along said Runkle's south line to a stone in the Ludlow line; thence south 18° east along said Ludlow line to the southeast corner of said section; thence south 88½° west 140.4 poles to the place of beginning, containing nine-six acres, more or less, reserving and excepting out of the above-described ninety-six acres 11 acres now owned by A. Sanders Piatt, beginning at two jack oaks, southeast corner of said section 16 in Ludlow's line; thence west 77 poles to the center of the county road; thence north with the center of said road 73¼° east, 73 poles to a stone in the Ludlow line; thence with said Ludlow line south 20° east, 24 poles crossing the old channel of Mackachuk creek, at 8 poles to beginning, the amount hereby intended to convey being three hundred & twenty-nine acres, more or less; also, another lot of land in said county, beginning at a stake, corner between sec. 15, 16, 21, & 22, in a prairie; thence with the line of sec. 22 west 6 chains and 75 links to a burr oak 5 inches in diameter; thence north 52° east, 28 links; thence N. 55½° E., 8 chains & 32 links to a wild cherry 6 inches in diameter; thence N. 27½° E., 32 links in the line between sec. 22 and 16; thence with said line S. 4 chains & 78 links to the beginning, containing one acre & $\frac{60}{100}$ of an acre of land, being part of the S. E. quarter of sec. 22, town. 5, range 13, and being same premises conveyed by John O. A. Runkle & Anna L. Runkle, his wife, to Ellen Nash by deed recorded in book 38, page 478, in the recorder's office of Logan county; also, the following-described real estate, to wit: All that certain tract of land in *in* the county of Logan and State of Ohio, and in the Congress district, so called, bounded and described as follows: Being fractional section number seventeen and part of fractional section No. twenty-three, of town. five, of range thirteen, in Logan county, Ohio; beginning at the southeast corner of said section No. seventeen, at a post in Ludlow's line; thence with said line N. 18¾° W., 236.6 poles to a point in the river 8 feet east of the northeast corner of the bridge; thence down the river on the northwest side thereof at the water's edge to a post from which the said corner at the bridge bears N. 48° E., 85 poles; thence S. 18° E., 9.5 poles, crossing the river twice, cutting off a large bend to a post; thence continuing down the river as before to a post in the line of John Kelley's land at the mouth of a spring branch; thence S. 1° W., 36 poles, running in the river from one to eighteen

poles, and crossing it at 34 poles to a post, corner to said John Kelley's, from which a willow 5 inches in diameter, marked with two transverse cuts near the root, bears S. 61¾° E., 123 links; thence S. 10½° E., 96.3 poles, crossing the river at 11 poles to a post in the south line of said section No. 23; thence S. 89° E., 141.10 poles to the place of beginning, containing one hundred and forty-one acres and seventy-seven hundredths of an acre (141.77), be the same more or less, except about one acre on the east side of the road now traveled, called the Ludlow road, and subject to the reservations contained in a deed from Charles Moots and wife to John Nash, in book 43, pages 291–'2 of the recorder's office in said county; also that certain other tract of land in said county of Logan and State of Ohio, being part of section No. twenty-three, town. five, range thirteen, M. R. S., beginning at a post in the south line of said section southwest corner to land once belonging to Charles Moots; thence N. 88½° W. 59.4 poles to a post; thence N. 7½° W. 79.7 poles, crossing Mad river, to a post; thence N. 87½° E. 56.4 poles, crossing Mad river, to a post from which an elm tree six inches in diameter bears south 10° east 73 links; thence S. 10° E. 104 poles crossing Mad river twice to the place of beginning, containing thirty-two acres and thirty-seven hundredths of an acre. (32.37 acre); also that certain other tract of land in said Logan county and State of Ohio, being the north part of section 16, town. 5, range 13, M. R. S., as surveyed by O'Hayes on the 28th day of July, 1862, beginning at a stone original northwest corner to said section; thence S. 2° W. 198.2 poles to a stone in the west line of said section; thence N. 88½° E. 101.2 poles to a stone in the Ludlow line; thence N. 18° W. with the present bearing of said Ludlow line 211 poles to a stone in said line original N. E. corner of said section, from which a black oak 16 inches in diameter bears N. 77½° W. 19 links, and thence S. 88½° W. 28 poles to the place of beginning, containing eighty acres, more or less; all said premises being the same conveyed by William L. Avery to Ellen Nash by deed recorded in book 48, pages 342–'3, in recorder's office of Logan county.

And all the estate, title, and interest of the said John Nash and Ellen Nash, his wife, either in law or equity, of, in, and to the said premises, together with all the privileges and appurtenances to the same belonging, and all the rents, issues, and profits thereof; to have and to hold the same to the only proper use of the said Hugh Colville, his heirs and assigns, forever.

And the said John Nash and Ellen Nash, his wife, for themselves and for their heirs, executors, and administrators, do hereby covenant with the said Hugh Colville, his heirs and assigns, that they are the true and lawful owners of the said premises and have full power to convey the same, and that the title so conveyed is clear, free, and unincumbered; and further, that they will warrant and defend the same against all claim or claims of all persons whomsoever: Provided, nevertheless, That if the said John Nash shall well and truly pay, or cause to be paid, to the said Hugh Colville the sum of thirteen thousand dollars ($13,000.00), with interest from the date hereof,

at the rate of eight per cent. per annum, according to the tenor of said Nash's promissory note of even date for the sum of $13,000, payable at the Commercial Bank of Cincinnati three years after date, with interest at the rate of eight per cent. per annum, to the order of said Hugh Colville, then these presents to be void.

In witness whereof the said John Nash and Ellen Nash, his wife, have hereunto set their hands and seals this fourth day of December, in the year of our Lord one thousand eight hundred and seventy-six.

JOHN NASH. [SEAL.]
ELLEN NASH. [SEAL.]

Signed, sealed, and acknowledged in presence of us—
GEO. W. POLAND.
W. A. PURTLDCARGH.

Witness:
RUFUS KING.
HUGH COLVILLE.

THE STATE OF OHIO, }
County of Champaign, } *ss:*

Be it remembered that on the 4th day of December, in the year of our Lord one thousand eight hundred and seventy-six, before me, the subscriber, a notary public within and for said county, personally came John Nash and Ellen Nash, his wife, the grantors in the foregoing mortgage deed, and acknowledged the signing and sealing thereof to be their voluntary act and deed for the uses and purposes therein mentioned, and the said Ellen Nash, wife of said John Nash, being examined by me separate and apart from her said husband, and the contents of said mortgage being by me made known and explained to her, as the statute directs, declared that she did voluntarily sign, seal, and acknowledge the same, and that she is still satisfied therewith, as her act and deed for the uses and purposes therein mentioned.

In witness whereof I have hereunto subscribed my name and affixed my notarial seal on the day and year aforesaid.

[SEAL.] GEO. W. POLAND,
Notary Public, Champaign County, Ohio.

On the back of the mortgage was the following indorsement:

2.50 paid by W. W. & K. Received Dec'r 11th, 1876, at 3 o'clock p. m. Recorded Dec'r 12, 1876, in Logan county, Ohio, volume 2, pages 106, 107, & 108. J. O. Sweet, recorder.

[Indorsed:] Sup. Court U. S. 1886. October term. No. 200. J. F. D. Lanier *et al.*, app'ts, *vs.* John Nash *et al.* Writ of certiorari and return. Filed Nov. 15, 1886.

[Stamped:] Office Supreme Court U. S. Filed Nov. 15, 1886. James H. McKenney, clerk.

Contract
Colorado 51-52-61

Sandoval 58

Cornell 59-61
Nash 75-75
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Sale
Sandoval Bros and Thompsons
ownership 56

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Explained page 71

Incorporated Merchants
Bank reorganized 51

Nash debt all overdue
when reorganized bank 1863

121-404

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 200.

J. F. D. LANIER *et al.*, *Partners as* Winslow, Lanier & Co., *Appellants*,

vs.

JOHN NASH *et al.*, *Appellees*.

And now come the appellees, John Nash and Ellen Nash, his wife, and move the court for an order restraining William Goodrich, a party to this suit, from all proceedings in execution in the court of common pleas of Logan county, Ohio, on the judgment sued on herein, and which has been carried into a decretal order of sale by the circuit court of the United States for the northern district of Ohio. (Transcript, pp. 21–22, 81, 82, 83–84.

DAVID S. HOUNSHELL,
Solicitor for Appellees.

121-409
121-404

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1886.

NO. 200.

J. F. D LANIER, ET AL., Partners as WINSLOW, LANIER & CO., APPELLANTS,

VERSUS

JOHN NASH, ET AL., APPELLEES.

And now comes the Appellees, John Nash and Ellen Nash, his wife, and move the Court to dismiss the appeal of the Appellants herein, upon the ground that the suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the Federal Courts, and that the Appellants in said suit have been improperly and collusively made assignee and complainants in the Circuit Court, in this case, for the sole purpose of creating a case cognizable in the Federal Courts, and that the claim sued upon in this suit belongs exclusively to the Commercial Bank of Cincinnati, and is held in trust for them by Thomas Sherlock and Elliott H. Pendleton, Trustees of said bank.

DAVID S. HOUNSHELL,
Attorney for Appellees.

Hon. Rufus P. Ranney, Solicitor for Appellants in the above entitled cause:

You are hereby notified that on Monday the 15th day of November, 1886, or as soon thereafter as counsel can be heard, the Appellees in the above entitled cause, will submit to the Supreme Court of the United States, the foregoing motion to dismiss said cause and said appeal, and said motion will be filed in said cause in the mean time, as soon as practicable.

DAVID S. HOUNSHELL,
Solicitor for Appellees.

OCTOBER 1886.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1886.

NO. 200.

J. F. D. LANIER, ET AL., Partners as WINSLOW, LANIER & CO., APPELLANTS,

VERSUS

JOHN NASH, ET AL., APPELLEES.

And now come the Appellees, John Nash and Ellen Nash, his wife, and renew their motion filed herein, bearing date January 31st, 1887, asking for a restraining order against William Goodrich upon the grounds therein mentioned, and upon the additional ground that the said Goodrich has caused another and second execution to be issued against the said Appellees, John Nash and Ellen Nash, his wife, in the present month of February, 1887, and for a rule against the said Goodrich, he being a party to this suit, to show cause why he should not be attached for contempt, for causing said last execution to be issued, in violation of the supersedeas in this cause; pending the motion for a restraining order bearing the date above mentioned.

DAVID S. HOUNSHELL,
Solicitor for Appellees.

Messrs. Lee, Brown & Kincaid; and Messrs. McLaughlin & Dow, Attorneys for Wm. Goodrich, and William Goodrich:

GENTLEMEN:—You are hereby notified that on Monday, the 28th day of February, 1887, or as soon thereafter as counsel can be heard, the Appellees, John Nash and Ellen Nash, his wife, in the above entitled cause, will submit to the Supreme Court of the United States the foregoing motion for a restraining order, and rule to show cause why the defendant, Goodrich, should not be attached for contempt, and said motion will be filed in said cause in the meantime, as soon as practicable.

DAVID S. HOUNSHELL,
Solicitor for Appellees.

The Affiant John A. Nash, states that on the 19th day of February, 1887, the defendant, William Goodrich, knowing of the pendency of a motion in the Supreme Court of the United States in this suit, yet undetermined, asking for a restraining order against him, the said Goodrich, caused an execution to be issued against the Appellees John Nash and Ellen Nash, his wife, from the Common Pleas Court of Logan County, Ohio, upon the judgment sued upon in this case, in the Circuit Court of the United States for the Northern District of Ohio, held at Toledo, and that said execution is now in the hands of the Sheriff of Logan County, Ohio, who is proceeding to execute the same.

An office copy of said execution is herewith filed, and made part of this affidavit. Marked Exhibit A.

And the Affiant further says, that he mailed a copy of the above motion and affidavit accompanying the same to

Messrs. Lee, Brown & Kincaid, attorneys for William Goodrich, to their address at Toledo, Ohio, and Messrs. McLaughlin & Dow, attorneys of William Goodrich, in the Court of Common Pleas of Logan County, Ohio, to their address at Bellefontaine, Ohio, and to William Goodrich, himself, at his address, at Mac-a-Cheek, Ohio.

JOHN A. NASH.

Subscribed and sworn to by the Affiant, John A. Nash, this 23d day of February, 1887.

MARION M. KENNEDY,
Notary Public in and for Logan County, O.

(EXHIBIT A.)

VENDI. EXPONAS.

THE STATE OF OHIO, }
Logan County. }

To the Sheriff of our said Logan County—Greeting:

WHEREAS, By our Writ of Execution, Fieri Facias, which we lately commanded you that of the goods and chattels, or for the want thereof, then of the lands and tenements of John Nash and Nellie Nash in your bailiwick you cause to be made four hundred dollars, which William W. Goodrich, lately in our District Court of Common Pleas, begun and held at the Court House in Bellefontaine, in said Logan County, on the 25th day of March 1884, recovered against John Nash and Nellie Nash as well for $400 damages, which he had sustained as for $152.97 costs of suit. And you, at that day, returned to our said Court that, by virtue of said Writ, you had levied on the

following: One-half interest in one field of about 22 acres of growing wheat; one field of about 20 acres of growing wheat; about 27 acres of corn in shock. All of said wheat and corn is adjacent to and west of Ludlow road, on the lands of John Nash and Nellie Nash, in Monroe township, Logan County, Ohio

One half interest in one field of growing wheat of about 20 acres; one field of growing wheat of about 30 acres; one field of corn of about 30 acres in shock. All of said wheat and corn being north and adjoining the West Liberty and Middleburg pike, on the lands of John Nash and Nellie Nash, in Monroe Township, Logan County, Ohio.

Also 6 ricks of hay, and one stack, in field north of pike and east of Liberty township line on Nash lands.

THEREFORE, We command you, W. H. Lloyd, Sheriff of Logan County, Ohio, that you expose to sale said property, so by you in form aforesaid taken in execution, and have the money arising from such sale before our Court of Common Pleas, at Bellefontaine, within sixty days from the date hereof, to render to the said Plaintiff.

WITNESS MY HAND, and the Seal of our said Court of Common Pleas at Bellefontaine, Ohio, this 19th day of February, A. D. 1887.

S. A. McCOLLOCH, Clerk,

By J. A. McELLVAIN, Deputy Clerk.

[Seal]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1886.

NO. 200.

J. F. D. LANIER, ET AL., Partners as WINSLOW, LANIER & CO., APPELLANTS,

VERSUS

JOHN NASH, ET AL., APPELLEES.

And now come the Appellees, John Nash and Ellen Nash, his wife, and move the Court for a restraining order against William Goodrich, inhibiting him from all further proceedings to carry into execution his judgment rendered in the Court of Common Pleas of Logan County, Ohio, upon the ground that said Goodrich, sued upon said judgment in this case in the Circuit Court of the United States for the Northern District of Ohio, held at Toledo, and obtained the relief prayed for by him in the decree therein rendered, and that an appeal thereupon was prayed and granted to the Supreme Court of the United States, and an appeal bond duly executed appealing the case in all its branches to the Supreme Court of the United States, which appeal is now pending and undetermined in said Court, and the said Goodrich has since the execution of the appeal bond, and due perfection of the appeal, sued out execution upon said judgment rendered in the Court of Common Pleas of Logan County, Ohio, and caused the same to be levied by the

Sheriff of Logan County, and is now proceeding to execute the same in violation of the supersedeas obtained upon the appeal to the Supreme Court of the United States.

DAVID S. HOUNSHELL,

Solicitor for Jno. Nash and Ellen Nash his wife.

MESSRS. LEE, BROWN & KINKADE,

Solicitors for Wm. Goodrich in the above entitled cause:

You are hereby notified that on Monday the 31st day of January, 1887, or as soon thereafter as counsel can be heard, the appellees, John Nash and Ellen Nash his wife, in the above entitled cause, will submit to the Supreme Court of the United States, the foregoing motion for a restraining order, and said motion will be filed in said cause in the meantime, as soon as practicable.

DAVID S. HOUNSHELL,

Jan. 1887. Solicitor for Appellees.

127-404

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 200.

ADDITION TO RECORD.

In the Supreme Court of the United States. October Term, 1886.

J. F. D. LANIER *et al.*, Partners as Winslow, Lanier & Co., Appellants,
versus
JOHN NASH *et al.*, Appellees. } No. 200.

The affiant, John A. Nash, says that in the month of December, in the year 1880, William W. Goodrich, in the common pleas court of Logan county, Ohio, obtained judgment against John Nash and Ellen Nash, his wife, for the sum of $800.00, and that on the 7th day of July, 1881, the said Goodrich, in the case of J. F. D. Lanier *et al.*, partners as Winslow, Lanier & Co., appellants, *vs.* John Nash *et al.*, appellees, then pending in the circuit court of the United States at Toledo, filed his answer and cross-bill in said case against the said John Nash and Ellen Nash, his wife, and thereafter obtained the relief prayed for in his said answer and cross-bill against the said John Nash and Ellen Nash, his wife, as appears fully on page 84 of the transcript of said case, now pending on appeal in the Supreme Court of the United States, at the October term, 1886, No. 200.

The affiant further says that after the said judgment for $800.00 was rendered, in the month of December, 1880, in the common pleas court of Logan county, Ohio, the said John Nash and Ellen Nash, his wife, without executing bond for that purpose, carried, upon proceedings in error, the said case of William W. Goodrich against John Nash and Ellen Nash, his wife, to the district court of Logan county, and that upon the 25th day of March, 1884, the said court ordered that the said Goodrich remit from his said judgment $400.00, which being done the said court affirmed the said judgment of the court of common pleas for the sum of $400.00; all of which will more fully and at large appear by an office copy of said journal entry of March 25th, 1884, herewith filed and made part of this affidavit, marked Exhibit A.

The affiant further says that the said judgment for $800.00 rendered by the court of common pleas of Logan county, Ohio, which

was afterwards reduced, as above shown in Exhibit A of this affidavit, to $400.00, is the same judgment sued on by said Goodrich in the circuit court of the United States for the northern district of Ohio, held at Toledo, in the case of J. F. D. Lanier *et al.*, partners as Winslow, Lanier & Co., plaintiffs, *versus* John Nash *et al.*, defendants, which said case is now pending in the Supreme Court of the United States as No. 200 upon the present calendar.

The affiant further says that since the perfection of the appeal and supersedeas in the case of J. F. D. Lanier *et al.*, partners as Winslow, Lanier & Co., *versus* John Nash *et al.*, appellees, now pending and undertermined in the Supreme Court of the United States, the said Goodrich, in contempt of the appeal and supersedeas, has disregarded the process of the Federal court and wrongfully caused to be issued a writ of *fieri facias* against the goods and chattels of the said John Nash and Ellen Nash, his wife, and caused the sheriff to levy the said writ upon the same, as will appear by a copy of the execution and sheriff's return herewith filed and made part of this affidavit, marked Exhibit A.

The affiant further says that the said Goodrich is now proceeding to carry into effect said writ of execution against the said John Nash and Ellen Nash, his wife, in total disregard of the appeal and supersedeas aforesaid.

The affiant further says that he has deposited in the mail, duly post paid, the notice and a copy of the brief on the motion, directed to Messrs. Lee, Brown and Kinkade, at Toledo, Ohio, their proper address, they being the counsel of the said William Goodrich herein.

JOHN A. NASH.

Subscribed and sworn to before me by the affiant, John A. Nash, this 25th day of January, in the year 1887.

[Notarial Seal, Logan Co., Ohio.]

JAMES McADAMS,
Notary Public in and for Logan County, Ohio.

[Endorsed:] In the Supreme Court of the United States. October term, 1886. No. 200. J. F. D. Lanier *et al.*, partners as Winslow, Lanier & Co., appellants, *versus* John Nash *et al.*, appellees. Affidavit of John A. Nash, to be read on motion.

EXHIBIT A.

Logan — Common Pleas. October Term, A. D. 1886.

WILLIAM W. GOODRICH *vs.* JOHN NASH and ELLEN NASH.

This 10th day of December, A. D. 1880, judgment was rendered against John Nash and Nellie Nash in favor of William W. Goodrich for $800.00.

S. A. McCOLLOCH, *Clerk*,
By J. A. McILVAIN,
Deputy Clerk.

Logan District Court. March Term, A. D. 1884.

JOHN NASH and NELLIE NASH, His Wife,

vs.

WILLIAM W. GOODRICH.

MARCH 25, '84.

This day this cause came on for hearing upon the petition in error, the transcript, and the original papers and pleadings from the common pleas court of Logan county, and was argued by counsel. On consideration whereof the court do find that there is error in said judgment, in this, to wit, that the damages therein assessed are excessive, and it is ordered that the defendant in error remit from his said judgment the sum of four hundred dollars; and thereupon the said defendant in error, now coming in said district court and remitting from his said judgment the said sum of four hundred dollars, it is therefore considered that the said judgment of the court of common pleas be, and the same is hereby, affirmed as a judgment for the sum of four hundred dollars.

It is therefore considered that the said defendant in error do recover of the said plaintiff in error his costs herein expended, taxed to $—.

It is further ordered that a special mandate be sent to the court of common pleas of Logan county for execution upon said judgment.

STATE OF OHIO, *Logan County,* } *ss:*

I, S. A. McColloch, of the court of common pleas within and for the State and county aforesaid, do hereby certify *that* the foregoing to be correctly taken and copied from the journal of the district court of said county.

Witness my signature and the seal of said court, at Bellefontaine, this 24th day of January, A. D. 1887.

[Seal of Common Pleas Court of the County of Logan, Ohio.]

S. A. McCOLLOCH,
Clerk of said C't,
By J. A. McILVAIN,
Deputy Clerk.

STATE OF OHIO, *Logan County,* } *ss:*

I, S. A. McColloch, clerk of the court of common pleas within and for the State and county aforesaid, do hereby certify *that* the foregoing to be correct copies of journal entries in the case of John Nash *et ux. vs.* Wm. Goodrich, on file in clerk's office.

Witness my signature and *affix* the seal of said court, at Bellefontaine, this 27th day of Jan., A. D. 1887.

[Seal of Common Pleas Court of the County of Logan, Ohio.]

S. A. McCOLLOCH, *Clerk.*

EXHIBIT B.

Execution.

THE STATE OF OHIO, } ss:
Logan County, }

To the sheriff of said county, Greeting:

You are hereby commanded to cause to be levied of the goods and chattels, and, for want thereof, then of the lands and tenements, in your county of John Nash and Nellie Nash the sum of four hundred dollars and one hundred and fifty-two $\frac{97}{100}$ dollars, costs of suit, which by the judgment of the district court within and for the said county, at the March term thereof, A. D. 1884, William W. Goodrich recovered against the said John Nash and Nellie Nash, with 6% interest thereon, from the 10 day of December, A. D., 1880, until paid, and also the costs of increase on said judgment and the accruing cost thereon, and have that money before the said court of common pleas, within sixty days from the date hereof, to render unto the said William W. Goodrich; and have you then and there this writ with your doings under the same duly endorsed thereon.

Witness my hand and the seal of said court, at Bellefontaine, this 12 day of October, A. D. 1886.

[Seal of Common Pleas Court of the County of Logan, Ohio.]

S. A. McCOLLOCH, *Clerk,*
By J. A. McILVAIN,
Deputy Clerk.

[Endorsed:] Executive doc. K, page 240. Logan — common pleas. William W. Goodrich *vs.* John Nash and Nellie Nash. Execution. Judgment 25 day of March, 1884, for $400.00; pl'ffs' costs, 152.97; def't's costs, —; interest, 5.65; increase costs, —; increased costs, clerk, —; increase costs, sh'ffs, —; this writ, .75; interest on cost, 6%. Issued 188–. Filed Nov. 15, 1886. W. W. Goodrich.

THE STATE OF OHIO, } ss:
Logan County, }

Received this writ Oct. 12, A. D. 1886, at 10 o'clock a. m., and, pursuant to its command, I did, on the 14 day of Oct., A. D. 1886, at the hour of 2 o'clock p. m. of said day, levy upon the following described goods and chattels, to wit: ½ int. in one field of about 22 acres of growing wheat, one field of about 20 acres of growing wheat, about 27 acres of corn in shock; all said wheat & corn is adjacent to & west of Ludlow road, on the lands of John Nash and Nellie Nash, in Monroe township, Logan county. O.; ½ interest in one field of growing wheat of about 20 acres, one field of growing wheat of about 30 acres, one field of corn, in shock, of about 20 acres, one field of corn of about 30 acres, in shock, all of said wheat and corn being north and adjoining the West Liberty & Middleburgh pike, on the lands of John Nash & Nellie Nash, in Monroe t'p, Logan county,

Ohio; 6 ricks of hay & 1 stack in field north of pike and east of Liberty t'p line, on Nash lands.

STATE OF OHIO, }
Logan County, } *ss:*

I hereby certify *that* the foregoing to be a correct copy of the execution & the day thereon made by the sheriff of Logan county in the foregoing entitled case.

Witness my signature and the seal of said c't, at Bellefontaine, this 24th day of Ja'y, A. D. 1887.

[Seal of Common Pleas Court of the County of Logan, Ohio.]

S. A. McCOLLOCH,
Clerk L. Co., O.
By J. A. McILVAIN,
Dep'ty Cl'k.

[Endorsed:] In the Supreme Court of the United States. October term, 1886. No. 200. J. F. D. Lanier *et al.*, partners as Winslow, Lanier & Co., appellant-, *vs.* John Nash *et al.*, appellees. Affidavit of John A. Nash, to be read on motion.

[Endorsed:] Supreme Court U. S. 1886, Oct. term. No. 200. J. F. D. Lanier *et al.*, app'ts, *vs.* John Nash *et al.* Affidavit of John A. Nash & exhibits.

[Stamped:] Office Supreme Court U. S. Filed Jan. 31, 1887. James H. McKenney, clerk.

RECEIVED
APR 7 1887
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 200.

J. F. D. LANIER, CHARLES LANIER, JOHN W. ELLIS, EDWARD D. ADAMS, EDWARD WINSLOW, AND D. B. SAFFORD, PARTNERS AS WINSLOW, LANIER & CO.,—*Appellants*,

vs.

JOHN NASH, ELLEN NASH, EDWARD PURCELL, WILLIAM H. WEST, JAMES WALKER, *et al.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR THE APPELLANTS.

STATEMENT OF THE CASE.

The suit in the Circuit Court was brought by the appellants, to foreclose a mortgage upon lands in Union county, Ohio, given by the defendants, John Nash and Ellen his wife, to Hugh Colville, to secure the promissory note of said John Nash to the order of said Hugh Colville, dated December 4, 1876, for $13,000, payable three years after date, with interest at eight per cent. per annum, payable semi-annually. The other defendants were made parties as having, or claiming to have, some interest in or lien upon the mortgaged property. The bill alleged that the note and all the right, title and interest of said Hugh Colville in and to the mortgage securing the same,

were transferred and sold to the complainants before maturity, and that they were the owners and holders of the note and mortgage.

The defendants, John and Ellen Nash, answered, admitting the execution of the note and mortgage, but alleged that the same, together with a certain other note for the sum of $7,000, secured by the mortgage deed of said defendants of the same date on certain property in Cincinnati, then the sole and separate property of said Ellen Nash, were made and executed to said Colville, who was then the cashier of the Commercial Bank, of Cincinnati, to be by him held as collateral security for a loan of $13,000, obtained at or about the same time from said bank, by said John Nash and others, as John Nash & Co., on their promissory notes to the bank for $12,000 and $1,000, payable in a short day thereafter; that the note and mortgage sued on, and said mortgage for $7,000, were founded on no other consideration than said loan of $13,000, and were made to said Colville upon no other consideration, and for no other purpose than to be by him held as collateral security for the payment of said loan; that while said two notes and mortgages were so held by said Colville, proceedings were instituted in the proper court in Hamilton county, Ohio, against said John and Ellen Nash, to foreclose said $7,000 mortgage, under which proceedings said mortgaged premises in Cincinnati were brought to sale, and that from the net proceeds after payment of costs, $6,432.72, were ordered by said court in Hamilton county to be applied in discharge of the interest then, to wit, November 20, 1879, due to said bank on said loan, and the balance on the principal as of that date, which was done. Said defendants denied that there was due to the complainants the sum of $13,000, with interest, as alleged in their bill, but insisted that if any sum was due them it was only for the balance, which on November 20, 1879, remained due to said bank on said loan after the application of said sum of $6,432.72, as aforesaid, and proper interest thereon. The answer further stated that said defendants had no knowledge or means of

knowing that the complainants were the owners or holders of the note and mortgage sued on, or that the same were assigned or transferred to them before maturity. The defendants therefore denied the allegations of the bill in that behalf, and alleged that the complainants took said note and mortgage charged with notice of said equities and defenses in favor of said Ellen Nash, and after said note had become and was dishonored, of which fact, it was insisted, complainants then also had notice.

The defendants, Maurice Walsh and Johanna Mahon, assignees of Edward Purcell, a junior mortgagee, set up a similar defense to the complainants' claim, and alleged further that the complainants were not the *bona fide* holders and owners of said mortgage debt, but that they held the same in trust for collection on account of the Commercial Bank, of Cincinnati, which was alleged to be the real owner, and that the complainants paid nothing for the same, and did not purchase it of Hugh Colville. The other defendants made no attack upon the complainants' mortgage, but contented themselves with setting up their respective liens.

The complainants relied upon their title as *bona fide* purchasers for value before maturity. They also introduced evidence to show that the two mortgage notes were given to secure not only the contemporaneous loan of $13,000, but also an existing indebtedness of Nash to the Commercial Bank, of Cincinnati, for some $6,000.

The Circuit Court held that the complainants were not *bona fide* purchasers; that the two mortgages were given to secure only the loan of $13.000; that the Commercial Bank had realized $6,432.72 from the foreclosure of the other mortgage, and that the complainants were entitled to recover only the balance of the $13.000, with interest, after crediting said sum of $6,432.72.

ARGUMENT.

We submit that the clear preponderance of the evidence, especially when viewed in the light of the surrounding circum-

stances, shows that the two mortgages were given to secure not only the contemporaneous loans of the Commercial Bank to Nash, but also his existing indebtedness. The evidence on that subject is comprised in the testimony of Mr. Elliott H. Pendleton, then President of the bank, Mr. Hugh Colville, then its cashier, Mr. Nash and Mrs. Nash. All of these witnesses were called by the defense, and the defendants therefore vouch for their credibility.

Mrs. Nash [Record, pp. 73-75] testifies that she had personally nothing to do with the transaction. Mr. Nash [Record, pp. 75-81], without detailing the transaction, says, simply in general terms [Q. 4, p. 76], that he pledged the two mortgages to secure $12,000. Mr. Pendleton and Mr. Colville both swear that the mortgages were given to secure not only the $13,000, but also Nash's existing indebtedness to the bank. Nash was insolvent at the time, and had made an assignment. Why should a bank have made a loan of $13,000 on long time, to such a person, under such circumstances, except for the purpose of securing its existing debt? And why should Nash give two notes and mortgages, one for $7,000, and the other for $13,000, if the intention was to secure only $13,000?

Mr. Pendleton testifies [Record, p. 58]:

X-*Q.* 1. If you have any knowledge as to the agreement and consideration upon which the two notes of Mr. Nash for $7,000 and $13,000, respectively, which have been referred to, and the two mortgages by Mr. and Mrs. Nash for securing payment of the same were executed and delivered, please state the same fully.

A. They were given for the purpose of securing a loan of $12,000, and the balance of an indebtedness of between $5,000 and $6,000, due by Mr. Nash to the bank.

X *Q.* 2. By and between what persons was this agreement negotiated?

A. The loan was authorized by the board. I do not remember whether the arrangement with Mr. Nash was made by Mr. Colville, who was cashier, or by myself. Proposals

for loans were made either to Mr. Colville or to myself, and such proposals were referred to the board.

X-*Q.* 3. You say $12,000.00. Please state whether the agreement for new advances was limited to that amount, or whether it did not admit of securing a larger amount if Mr. Nash should desire it?

A. It was made to cover Mr. Nash's indebtedness which existed at that time, and may have been to embrace a still further small advance, but I do not think that anything of that kind was conditioned on the loan.

X-*Q.* 4. Was there not in fact a further advance of $1,000 made upon these collaterals to Mr. Nash, shortly after the advance of $12,000?

A. I do not remember that there was. The cashier, and not the president, is the one who carries out the instructions of the board in regard to loans.

X-*Q.* 5. In the negotiations for the loans, did Mr. Nash state for what object or purpose he wanted these advances; if so, what was it?

A. He stated they were for the purpose of paying other indebtedness of his, outside of the bank.

X-*Q.* 6. What consideration was offered to induce the bank to make him these further advances?

A. It was that the old indebtedness of Mr. Nash would be paid or secured.

X-*Q.* 7. How secured?

A. By the notes of $13,000.00 and $7,000.00, secured by mortgage of property belonging to Mr. and Mrs. Nash.

Mr. Colville testifies [Record, pp. 51-52]:

X-*Q.* 8. In answer to question 3 in chief, you stated that a loan of $12,000.00 was advanced to Mr. Nash at the time when those notes and mortgages were made to you. Please state what other indebtedness was secured by those two notes and mortgages?

A. We lent Mr. Nash the $12,000.00 with this collateral, with the understanding that he was to pay the balance of his

indebtedness to the bank, which, at that time, was in the neighborhood of $6,000.00 or $7,000.00, as well as I can remember.

X-*Q.* 9. Was there not a further advance of $1,000.00 cash made upon this collateral, in addition to the $12,000.00 above stated?

A. Yes; there was.

X-*Q.* 10. Was it not the agreement of the parties that the bank would advance these $13,000.00 upon these notes and mortgages, in consideration that they should also cover this previous indebtedness?

A. Yes, sir; from the proceeds of the sale of these mortgage notes our entire indebtedness was to be paid.

X-*Q.* 11. Please state whether renewal notes were not thereafter made and continued alike for the new advances as well as the previous indebtedness, and for what time these renewal notes were usually made?

A. Yes; for thirty, sixty, or ninety days; for different times.

X *Q.* 12. Was it not agreed that all these renewals should be made and kept upon the collateral security of the two notes and mortgages so made to you by Mr. and Mrs. Nash?

A. Yes; that was the understanding.

RE-EXAMINATION.

Q. 4. Then what is it you say the two mortgages were collateral to beside the $12,000?

A. Any indebtedness that he then owed us.

Q. 5. Then there was no specific contract?

A. None but an understanding or agreement.

Q. 6. With whom?

A. That was the understanding with the board when the money was lent to him, and with Mr. Nash.

ARE THE COMPLAINANTS BONA FIDE HOLDERS?

The original transaction in 1876 was between Nash and the Commercial Bank, of Cincinnati, a partnership. Colville was the cashier of this bank, and Pendleton its president. It closed its affairs July 4, 1879, and was succeeded by the Com-

mercial Bank, of Cincinnati, a corporation of which C. B. Foote was president, and with which Colville had no connection.

The corporation bought out the partnership, and both of the mortgage notes were transferred by the partnership, as part of its assets, and at par, to the corporation.

Pendleton, *Q.* 10-15, Record, pp. 54-55.

Foote, *Q.* 12-13, Record, p. 63.

Colville at that time endorsed the notes to the corporation [X-*Q.* 4, Record, p. 51]. Nothing is shown to impeach the *bona fides* of this transfer, and we submit, therefore, that the Commercial Bank, of Cincinnati, a corporation, became on July 4, 1879, the *bona fide* owner of the note in question, for value, in the regular course of business, and before maturity, and that the plaintiffs, having acquired title from that bank, may recover independent of the *bona fides* of their subsequent acquisition of the note.

Commissioners *vs.* Clark, 94 U. S., 278.

Cromwell *vs.* County of Sac., 96 U. S., 51.

Bassett *vs.* Avery, 15 Ohio St., 299.

Daniels on Negotiable Instruments, Sec. 803.

But there is no dispute in the evidence as to the *bona fides* of the plaintiffs' title. It rests upon the uncontradicted testimony of the plaintiffs themselves, who swear, in answer to the defendants' interrogatories [Record, p. 18], that they purchased the note November 14, 1879, for the sum of $13,985.84 cash, paid at the time of the transfer. The letter enclosing the note for discount is in evidence [Record, p. 71]. The plaintiffs had been for many years the New York correspondents of the Commercial Bank, of Cincinnati, and of its predecessors [Record, p. 63, *Q.* 19]. There is not a word of testimony to show that they had any knowledge or notice as to their vendor's title, or as to the origin of the note. They simply discounted a negotiable instrument for an old and reputable customer in the regular course of business, for full value, and before maturity. The decree of the Circuit Court was based upon a suspicion conjured in the face of elementary rules of

law. The Circuit Court found that the note had been sold and transferred to the complainants before maturity, and that they had paid full value therefor, but the decree was nevertheless against them, because, "the circumstances attending and connected with the sale were sufficient to have put the complainants on inquiry, and they consequently acquired no other or greater right than was possessed by the bank from whom they derived their title." [Decree Record, p. 82, and Opinion, p. 47.]

But that doctrine was long ago exploded by this court.

Goodman *vs.* Simonds, 20 How., 343.
Swift *vs.* Tyson, 16 Pet., 1.
Murray *vs.* Lardner, 2 Wall., 110, 121.
Hotchkiss *vs.* National Banks, 21 Wall., 354.
Brown *vs.* Spofford, 95 U. S., 474.
Swift *vs.* Smith, 102 U. S., 442.
Johnson *vs.* Way, 27 Ohio St., 374.
Smith *vs.* Livingston, 111 Mass., 342.

Respectfully submitted,

LAWRENCE MAXWELL, JR.,
Of Counsel.

RUFUS KING,
SAMUEL J. THOMPSON,
Of Counsel.

NOTE.

The note sued on was inadvertently omitted from the transcript. By agreement of counsel it is here printed as part of the record.

$13,000.00. CINCINNATI, December 4, 1876.

Three years after date, I promise to pay to the order of Hugh Colville, Thirteen Thousand Dollars, payable at the Commercial Bank, value received, with interest at eight per cent. per annum. Interest payable semi-annually.

No. Due Dec. 7, '79. JOHN NASH.

Endorsed: HUGH COLVILLE.

121-404

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1886.

NO. 200.

J. F. D. LANIER, CHARLES LANIER, JOHN W. ELLIS, EDWARD D. ADAMS, EDWARD WINSLOW, and F. B. SAFFORD, Partners as WINSLOW, LANIER & CO., APPELLANTS,

VERSUS

JOHN NASH, ELLEN NASH, EDWARD PURCELL, WILLIAM H. WEST, JAMES WALKER, ET AL., APPELLEES.

APPEAL IN EQUITY

From the Circuit Court of the United States for the Northern District of Ohio, sitting in Chancery at Toledo.

BRIEF OF DAVID STUART HOUNSHELL,

ATTORNEY FOR APPELLEES.

EXCELSIOR PRINT, BELLEFONTAINE, O.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1886.

NO. 200.

J. F. D LANIER, CHARLES LANIER, JOHN W. ELLIS, EDWARD D. ADAMS, EDWARD WINSLOW, and F. B. SAFFORD, Partners as WINSLOW, LANIER & CO., APPELLANTS,

VERSUS

JOHN NASH, ELLEN NASH, EDWARD PURCELL, WILLIAM H. WEST, JAMES WALKER, ET AL., APPELLEES.

APPEAL IN EQUITY

From the Circuit Court of the United States for the Northern District of Ohio, sitting in Chancery at Toledo.

STATEMENT.

The Appellee, John Nash, who was a defendant below, and a citizen of the State of Ohio, on the 18th of November, 1876, submitted a proposition for a loan of ten or eleven thousand dollars for sixty days to the Commercial Bank of Cincinnati; a company incorporated by the State of Ohio, having its office at the City of Cincinnati in said State; through its Cashier, Hugh

Colville, proposing that he, Nash, in consideration of said loan, would deposit with said bank, ample collateral security for the payment of said loan. See Transcript page 75, Ans. 3 of the deposition of John Nash.

Said Colville, as Cashier of said Bank, laid said proposition before the Board of Directors of said Bank, who agreed to the said proposition of Nash, he, Nash representing that he had a promise from parties who would take the collateral security from said Bank and pay off said loan made by the Bank to him. Nash on the 4th day of December, 1876, went to the Bank with two notes and mortgages of even date, one note and mortgage bearing date December 4th, 1876, for seven thousand dollars, ($7,000.00) due three years after date, and bearing interest at 8 per cent. per annum, and the interest payable semi-annually; and the other note and mortgage for thirteen thousand dollars, ($13,000.00) bearing date December 4th, 1876, due three years after date, bearing interest at 8 per cent. per annum, interest payable semi-annually. He, Nash, then drew his third individual note, payable to the said Bank, bearing date December 4th, 1876, for the sum of twelve thousand dollars, ($12,000.00) due sixty days after the date thereof, which last mentioned note, the said Bank discounted and delivered the proceeds thereof to said Nash. Mr. Pendleton, the President of the Bank, at first objected to making the loan of twelve thousand dollars, (12,000.00) as Nash had only asked for a loan of ten or eleven thousand dollars, but consented to do so upon Nash representing to him that he owed some other claims of which he did not know at the time he first applied for the loan. Thereupon the contract of loan was consummated, by Nash executing on his part the agreement with said Bank, by delivering to it his said three several notes above mentioned, and the two mortgages

above mentioned, executed by himself, and his wife Ellen Nash upon the real estate of Ellen Nash, situated in Cincinnati, Ohio, and in Logan County, Ohio, the same shown by the Transcript, pages 1, 2, 3 and page 35. The two mortgages respectively for seven and thirteen thousand dollars, upon the property of Ellen Nash, were collateral ALONE. to the twelve thousand dollar note, executed to the Bank by John Nash ALONE, (and discounted by it,) as were also the two individual notes of John Nash, respectively for seven and thirteen thousand dollars. The principal debt, was the TWELVE THOUSAND DOLLAR NOTE, discounted by the Bank, and the two other notes and mortgages were collateral ALONE for the payment of the TWELVE THOUSAND DOLLAR NOTE, or in other words, the Bank on the 4th day of December. 1876, received from John Nash the note for twelve thousand dollars, ($12,000.00). the principal debt. and as collateral thereto his two individual notes for seven and thirteen thousand dollars respectively, and Ellen Nash mortgaged her real estate in Cincinnati and in Logan County as collateral for the payment of the principal debt of twelve thousand dollars. This last mentioned note was discounted by the Bank on sixty days time, at the expiration of which it was renewed for the period of sixty days by John Nash ALONE, and at the maturity thereof, was not met, but upon the contrary was dishonored for non payment. At the time Nash negotiated the loan for twelve thousand dollars, ($12,000.00) he had two separate accounts with the Commercial Bank of Cincinnati, one as John Nash & Co., the other as John Nash individually. He was at that time, on the two accounts, behind in an amount aggregating in all several thousand dollars secured by collaterals deposited with the Bank. Soon after the negotiation of the twelve thousand dollar loan, Nash individually borrowed one thousand dollars ($1,000)

on short time, and at the maturity of the note executed for the same, paid it off. This loan was without the knowledge or consent of Mrs. Nash and could not rightly be charged to the mortgage collaterals executed by her. Daniel O'Connell, the managing agent of John Nash & Co., in the absence of Nash, and without his authority, or the authority of Mrs. Nash, on the 13th day of January, 1877, negotiated a loan of one thousand dollars ($1,000) with said bank in the name of John Nash & Co.. for which, he executed a note for said amount, which said note was not met at maturity, and has erroneously been charged, in the opinion of Judge Baxter, to the mortgage collaterals executed by Mrs. Nash. See answer in deposition of John Nash to question 11 transcript p. 77 — also opinion of Judge Baxter, transcript p. 46.

John Nash & Co. at the time of the negotiation of said loan, by O'Connell, were in business, and so continued to be until the 18th of January, 1878, at which time Nash made an assignment for the benefit of his creditors, and the said loan of one thousand dollars ($1,000) obtained from the Bank by O'Connell, could not be rightfully charged to the mortgage collaterals executed by Mrs. Nash. See answer in deposition of said O'Connell to question 3, Transcript p. 59, and also answer in deposition of John Nash to question 11, Transcript p. 77.

The Commercial Bank on the 10th day of May 1879, sued to a decree of foreclosure and sale, the said note and mortgage for seven thousand dollars ($7,000) executed by John Nash and Ellen Nash on the Cincinnati property, before the maturity of the principal of said note and mortgage, and realized on the 28th of November, 1879, $6.432.72 as proceeds of said decretal sale, which said amount should as of the date of November 28, 1879, have been credited upon the principal debt of twelve

thousand dollars, ($12,000.00) which with the interest thereon at this time, amounted to $13,910.00 from which deducting $6 432.72, would leave but $7,474.28, of the principal debt of $12,000.00. The said $12,000.00 note for one hundred and twenty days next after the date thereof being in Bank under discount did not bear interest.

This application of the proceeds of the mortgage upon the Cincinnati property is one of the contentions of the Appellees, John Nash and Ellen Nash, as also of the *puisne* incumbrancers.

On the other hand the contention of the Appellants, is that it should be applied to the aggregated indebtedness of John Nash & Co., and John Nash, which prior to said loan of $12.-000.00 had been contracted and secured by collaterals. The Appellants also compute interest upon the entire indebtedness of John Nash & Co., and John Nash, at the rate of 8 per cent. per annum from the date it was contracted, and upon the special loan which they claim to have been $13,000.00 from the date of the principal debt of $12,000.00, viz: December 4th, 1876. This estimate makes a great difference and error in favor of the appellants, when carried into operation. The Transcript shows from the proof taken, that John Nash & Co., and John Nash, owed to the Commercial Bank on FORMER transactions several thousand dollars secured by collaterals, at the time the principal debt of $12,000.00 was negotiated; and for the payment of which latter amount the mortgages and accompanying notes were specially deposited. It will appear then, that on every score John Nash & Co., and John Nash, including the special loan of $12,000.00 on the 4th of December, 1876, owed the Commercial Bank, but about $17,000.00, and at the same time the Bank held as collaterals, three notes executed by John Nash, as of the date of December 4th, 1876, amounting in the

aggregate to $32,000.00, viz: The principal debt of $12,000.00 due sixty days after date: The note for $7,000, due three years after date, and the note for $13.000 due three years after date. These three notes represented the special loan for $12,000 on the 4th of December, 1876. Ellen Nash, for the payment of this special loan of $12,000, and for no more, executed and delivered her mortgages respectively for $7,000 and $13,000, upon the Cincinnati and Logan County real estate belonging to her. The collaterals held by the Bank for the indebtedness of John Nash & Co., and John Nash, contracted prior to the special loan of $12,000 on the 4th of December, 1876, amounted to $3,924.99 without interest. See answer to question 8, deposition of John Nash, Transcript p. 77. These collaterals are still in the hands of the Commercial Bank.

On the 10th of May 1879, when the Commercial Bank instituted proceedings of foreclosure upon the $7,000 note and mortgage, the $13.000 note and mortgage occupied the same status. This latter note and mortgage in the month of November, 1879, were placed in the hands of the Appellants, by the Commercial Bank for collection, and the Appellants had notice of the payments made upon said note, and at that time the Bank offered to guarantee the collection of said note and mortgage if purchased by the Appellants. See exhibit "E" and "F" of deposition of C. B. Foote, pages 70-71 of Transcript. These exhibits of a date prior to the 14th of November, 1879, when the Appellants fraudulently claimed to have purchased said note and mortgage, show conclusively that they were tainted by the bad faith of the Commercial Bank, and were the willing. supple instruments in the perpetration of the fraud contemplated by the Commercial Bank. The bad faith of the Bank and appellants to the appellees, Nash and wife, is conslusively shown

by exhibit "G" of the deposition of said Foote. Transcript p. 71. This latter exhibit bearing date after the said 14th day of November, 1879, when the appellants pretend to have purchased said note and mortgage, shows the subterfuge of the Bank, in attempting an evasion about the alleged payment of interest and directions and control of the Bank of said claim, and the fraudulent artifice not to charge it to the account of the Bank, under discount as had been done, but to hold it that suit might be brought in the name of the appellants. This exhibit also makes reference to a letter to the appellants written by Messrs. King, Thompson & Maxwell, the attorneys of the Bank. with directions to return it to said Foote, President of the Bank, and this letter the Bank pretends to have lost. As late as December 3, 1879, exhibit "F" of said Foote's deposition (only eleven days of a month after the alleged and pretended purchase of said note and mortgage) discovers the Commercial Bank and the appellants, their confederates in fraud entering into continued guarantees about the collection of said notes and mortgages See Transcript p. 71.

Exhibits "I and J" of the deposition of said Foote, show the Commercial Bank, as late as the 10th of December, 1879, directing the appellants what to say to spur the appellees on to a payment or new arrangement for the payment of said mortgage and note, and directing them whom to employ as counsel and restricting the suit to be brought in the United States Circuit Court "*in your name*" and not content with this specific direction; they further add that the distinguished attorney employed will be referred to Messrs. King, Thompson & Maxwell, "for any information required for the suit," and this too upon an alleged promissory note, negotiable by the law merchant, and secured by mortgage. assigned to *bona fide* holders for value before ma

turity. The Commercial Bank concludes its correspondence in exhibit "I" with the significant phrase of benevolent charity–"*Of course we will bear all expenses.*" See Transcript p. 72. Exhibit "J" of Foote's deposition, bearing date February 10, 1880, discovers the Commercial Bank dominating to the last in directions for the appellants to proceed "in accordance with the terms of my letter of the 10th of December." See Transcript p. 72. The above facts discover *bad faith* on the part of the appellants and the Commercial Bank to the appellees, Nash and wife, and the law and the facts, as we shall hereafter proceed to show discover an attempt to perpetrate a like fraud upon the jurisdiction of the United States Courts.

The complainants' bill in the court below, discovers the fact, that the suit was brought not upon the principal debt for $12,000; nor upon the collateral note of $13.000, executed by John Nash, but upon the mortgage for $13.000, executed by John Nash and Ellen Nash, and delivered to the Bank as collateral to the $12,000 note, executed by John Nash to the Commercial Bank, and discounted by it.

BRIEF OF APPELLEES.

JURISDICTION OF CIRCUIT COURT.

Among other things, it is provided by the act of March 3d, 1875, Sup. Rev. Stats. 173, as follows, viz: "Nor shall any Circuit or District Court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such Court to recover thereon, if no assignment had been made, except in cases of promissory notes negotiable by the law merchant, and bills of exchange"—18 U. S. Stats., 470; 1 Sup Rev. Stats., 173; and by Section 5 of said act, it is provided, "That if, in any suit commenced in a Circuit Court, or removed from a State Court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court at any time after such suit has been brought, or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand

it to the Court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

In view of the provisions of the said act above quoted it is submitted that the jurisdiction of the Federal Courts must fail upon the following material grounds, viz. :

1. That the contract of loan discovered by the record herein, does not contain as between the parties to the record, and the contract of loan, the material elements of a promissory note *negotiable by the law merchant, or of a bill of exchange,* such as is required by said act to give jurisdiction to the Federal Courts at the suit of an assignee upon a chose in action where the original parties to said chose are citizens of the same State.

2. That the suit herein, as shown by the record, does not really and substantially involve a dispute or controversy properly within the jurisdiction of the Federal Courts.

3. That the appellants in this suit have been improperly or collusively made and joined as plaintiffs for the purpose of creating a case under the said Act of March 3d, 1875. And first the contract of loan between John Nash and the Commercial Bank, consists of five material parts.

1. The principal note of John Nash to the Commercial Bank for $12,000, due sixty days after date, which was discounted by the bank.

2. The collateral note for $7,000 executed by John Nash to Hugh Colville, due three years after date.

3. The collateral note executed by John Nash to Hugh Colville for $13,000 due three years after date.

4. The mortgage executed by John Nash and Ellen Nash for $7,000 due three years after date.

5. The mortgage executed by John Nash and Ellen Nash to Hugh Colville for $13,000, due three years after date.

These five instruments all bear date December 4th, 1876, and were all parts of one and the same transaction, and the four last mentioned were collateral for the payment of the first, which was the principal debt of $12,000 under discount at sixty days in Bank.

Thus stood the contract of loan on the 4th day of December, 1876, and clearly defines the rights of the parties thereto, at that time. Before the alleged transfer of the note and mortgage for $13,000 to the appellants on the 14th day of November, 1879, the Bank had realized by the foreclosure suit upon the $7,000 note and mortgage, and the principal debt of $12,000 which had matured long before the foreclosure suit, was still overdue. How then stands the matter with regard to the appellants upon the 14th day of November, 1879? Their correspondence with the Commercial Bank discloses to them that only a few days short of a year's interest, which was payable semi-annually, was overdue on said note of $13,000. See exhibits "E" and "F" of Foote's deposition, Transcript pp. 70-71, Jones on Pledges, Sec. 101.

They likewise had before them the extraordinary commencement of an important negotiation of this sort in the following letter from Charles B. Foote, President of the Bank, viz.:

"The Commercial Bank of Cincinnati hereby guarantees collection and payment on the note of John Nash, to the order of Hugh Colville, dated December 4th, 1876, for $13,000 at three years, with interest at 8 per cent. annually, and the mortgage securing the same, if purchased by Messrs. Winslow, Lanier & Co

The first two years interest has been paid."

[Signed] CHARLES B. FOOTE, Pres't.

See Transcript page 70.

This extraordinary introduction to an important negotiation, is without date, and does not appear to be addressed to any particular person or persons, except as shown in the body of the communication. They further had notice by a second communication from Charles B. Foote, President, expressed in the following words and figures, viz:

CINCINNATI, OHIO, Nov. 12th, 1876.

MESSRS. WINSLOW, LANIER & CO., New York,

GENTS:—I enclose herewith note of John Nash, with mortgage, dated December 4th, 1876, at three years, with interest at 8 per cent., for $13,000; the first two year's interest paid.

I will thank you to place this note to the credit of the bank under discount, and oblige,

Yours very respectfully,

[Signed] CHARLES B. FOOTE, Pres't.

Transcript page 71.

The usual course of transit by mail, would not have borne to the appellants this note and mortgage from Cincinnati to New York, much under two days, which would bring it up to the 14th of November, 1879, when the appellants claim to have purchased the note and mortgage. Then there is this remarkable phrase, "*I will thank you to place this note to the credit of the Bank under discount.*" Does this language import the terms of of a sale? and if not, how are we to account for a change of base, as it would be difficult for the parties who were at opposite ends of a line drawn from Cincinnati to New York; just two days before to come together in such a way as to upset the above scheme or plan, by the substitution of another. It is possible that time enough by telegraph elapsed for that purpose after the receipt of the note and mortgage in New York, but there is no telegraphic correspondence in the record. The con-

clusion therefore is irresistable, that "*this note was placed to the credit of the Bank under discount,*" *when received by the appellants.* This conclusion is rendered even more certain by what transpired after the 14th of November, 1879, in the correspondence of the Commercial Bank with the appellants. See exhibits "G," "H," "I," and "J," of Foote's deposition, Transcript p. 71-2. They also had notice on the receipt of the papers of the terms of said note, which is expressed in the following words and figures, viz:

$13,000. CINCINNATI, Dec. 4th, 1876.

Three years after date, I promise to pay to the order of Hugh Colville, $13,000, payable at the Commercial Bank, value received, with interest at 8 per cent. per annum. Int. payable semi-annually.

[Signed] JOHN NASH.

The Commercial Bank *in limine* never asked the appellants to trust to the note and mortgage, but offered in the foreground their guaranty, and the appellants, shrewd business men, who knew nothing of John Nash and Ellen Nash, or of the value of the mortgaged property, upon the guaranty of the Bank; made the note and mortgage a basis of credit for the bank on discount. That the note and mortgage were continued on this basis after the 14th of November, 1879, is shown by the exhibits "G," "I" "J" of Foote's deposition, Trans. pp. 71-2 and negative the pretense, that the appellants were the purchasers of said note and mortgage or that they were without a knowledge of the bad faith of the bank.

The three several grounds of objection to the jurisdiction of the Federal Courts above enumerated, we will consider together as tending to abridge, rather than protract the discussion.

The Federal Courts are Courts of limited jurisdiction and

cannot take cognizance of any suits or cases not authorized by the Constitution or statutes of the United States.

The jurisdiction of the Federal Courts to entertain suits for the enforcement of choses in action, is derived under the Constitution from the 11th section of the Judiciary Act, and the first section of the Act of the 3d of March, 1875.

In a restricted sense, no contract by an assignee can be sued to judgment in the Federal Courts, unless his assignor could have sued if no assignment had been made, "except in cases of promissory notes negotiable by the law merchant and bills of exchange.

The case at bar arises under that part of the exception exclusively, which relates to promissory notes negotiable by the law merchant. The jurisdiction of the Courts of the United States upon the subject of promissory notes, divides itself into two parts, viz:

1. The jurisdiction that arises exclusively from the citizenship of the parties to the promissory note, the plaintiff and defendant at the time of making the note being citizens of different States of the Union, and this attaches both to promissory notes negotiable by the law merchant and promissory notes not negotiable.

2. That jurisdiction which attaches to notes negotiable by the law merchant, where the original parties are citizens of the same State, on assignment to a citizen of another State, and which jurisdiction may be said to cohere as much to the character of the paper as to the citizenship of the parties, for it is a *sine quanon* that both must exist *simul et semel*.

The jurisdiction under the second branch of the subject will clearly not attach to a promissory note executed by one citizen to another of the same State, which is not negotiable by the law

merchant, though duly assigned to a citizen of another State for the Act of the 3d of March 1875 does not stretch to this extent.

Now casting aside all that class of paper embraced in the first branch of jurisdiction. and also promissory notes. not negotiable. made between citizens of the same State, and assigned to a citizen or citizens of another State, we are brought directly to the question which touches the paper negotiable by the law merchant under the Act of the 3d of March, 1875, executed by one citizen to another of the same State, and assigned by the latter to a citizen of another and different State, which as applied to the case at Bar involves exclusively the question whether or not the contract of loan between the Commercial Bank of Cincinnati and John Nash, was in whole or in part, on the 14th of November, 1879, negotiable by the law merchant in a sense to confer jurisdiction upon the Federal Courts to take cognizance of the case. And here let us observe that the contract sued upon, must be negotiable by the law merchant at the time of the assignment or transfer. In this kind of paper the right of the assignee, who is an innocent holder for value without notice of any equities between the parties to a promissory note before the maturity thereof. to recover thereon, is another and quite a different thing from his right to sue upon such paper in the Federal Courts at all hazards. If the paper be not negotiable at the time he receives it, his innocence will not confer jurisdiction in the Federal Courts, although he might be entitled to recover in those States where the Courts follow the rule established by the Supreme Court of the United States in a well considered series of decisions from the case of Swift vs. Tyson, down to the present time. Under the rule established in this Court, differing from that of the State of Ohio, New

York and many other States of the Union, the endorsee of a negotiable, promissory note before maturity with collateral security in the form of a non-negotiable chose in action, is entitled to recover the full amount of the the face of the note, although he may have paid less, and therefore the collateral security must make this amount good; but if the paper sued on be not negotiable at the time the endorsee receives it, although he may recover under the rule established in this court, yet he must seek another tribunal where the jurisdiction attaches to enforce non-negotiable securities, for neither the good faith nor bad faith of parties to a contract, nor even their agreement or acts can give jurisdiction where the Constitution and Statutes withhold it. For example, a collateral security, negotiable in form, would not carry with it the attributes of negotiability if it were written upon it that, "This note is held as collateral security, although neither the principal debt nor the collateral security at the time the latter was received was due for the reason that two contracts are set forth, viz.: The primary or original contract which is to pay a given sum upon a day certain, and the secondary or conditional contract, that if the primary or original contract is not satisfied, that the secondary or conditional will take its place and satisfy it. In other words the requirements of the statutes to give jurisdiction, demand negotiability—in fact at the time of the transfer whereas negotiability in form might be enforced under the rule of this court in a Court of Plenary Jurisdiction. This brings us directly to the question of negotiability of paper under the law merchant which is a *sine qua non* to confer jurisdiction under the act of March 3d, 1875, and now the shortest road to a solution of the question at bar, is to answer this question: Was the note of John Nash for $13,000, negotiable upon the 14th of November,

1879, when the appellants pretend to have purchased it from the Commercial Bank of Cincinnati ? All the proof shows that this note was held as collateral for the $12,000 note, then overdue. which had been executed by John Nash, and constituted the principal debt. Jones on Pledges, section 102, in speaking of negotiable notes pledged as collateral, says: "A note which states that it is to be held as collateral security, is not negotiable. And so a memorandum put upon a promissory note, by the maker of it, before delivery, that it is given as collateral security, destroys its negotiability ; for the words indicate that there may be a contingency, namely: The performance of the undertaking to which it is collateral, in which the note would not be payable, and so it lacks that element of negotiability which requires that at all events a sum certain shall be payable at a time certain. Therefore an action cannot be maintained upon such a note by an endorsee, nor can an endorser of it be charged and held liable as an endorser of negotiable paper."

The principal note of $12,000 to which the $13,000 note was an incident, and by which it was governed, was then overdue, and possessed none of the elements of negotiability. In Sec. 651 of Chap. 17, Jones on Pledges, thus disposes of the right and power possessed by the Commercial Bank as regards its righ and power to dispose of the note and mortgage held by it as collateral for the $12,000 note. "A pledgee of commercial paper as collateral security cannot, in the absence of a special authorty for that purpose sell it upon the non-payment of the debt, and upon notice to the pledgor, either at public auction or private sale ; but he is bound to hold and collect the same when it falls due, and apply the money to the payment of the debt secured." Colebrooke on Collateral Securities, chapter 12, section 117, states the rule thus: "The pledgee of negoti-

able instruments, such as bills of exchange and promissory notes, so as to become a party thereto as collateral security for the payment of a principal note or obligation, is not entitled upon demand of payment, and default of the principal debt, and notice to the pledgee to offer such negotiable collateral securities at either public or private sale, in the absence of authority by special contract so to do."

This rule rests upon the foundation that negotiable securities, fettered for the time by being held as collateral securities for another debt are not negotiable in fact during the period for which they are so held. The test of negotiability is that the negotiable securities, by delivery, pass the title thereto, the same as coin of the realm passes in currency.

Williams on Personal Property, Part 5, Page 311, in treating of "Title" to personal property, thus states the law: "And first, with regard to money or negotiable securities no title at all is required to be shown by the payer in any *bona fide* transaction. Thus if a sovereign or bank note be offered in payment of a debt, it is no part of the duty of the creditor, under ordinary circumstances, to ask the debtor how he came by it. The reason of this rule, is founded on the currency of the articles in question, and on the great inconvenience to the trade and commerce which would ensue if the rule were otherwise. And the rule applies to all negotiable securities, *that is, to all instruments, the delivery of which passes the legal right to the property secured by them.* Promissory notes and bills of exchange payable to bearer, or payable to order, and endorsed in blank are accordingly within the rule. But if there be any *mala fides* on the part of the person receiving any money or negotiable security, or such gross negligence as may amount in itself to evidence of *mala fides*, the true owner may recover

such property, provided its identity can be ascertained." Miller vs. Race, 1 Burr 452; S. C. 1 Smith's Leading Cas. 250; Grant vs. Vaughan 3 Burr, 1516; Peacock vs. Rhodes, 2 Dong. 333; Clarke vs. Shee, Cowp. 197.

This paper never was negotiable in the hands of the Commercial Bank, and was not negotiable by the law merchant at any time, and the Act of the 3d of March, 1875, requires as an indispensible condidition to jurisdiction in the Federal Courts, that the paper shall be negotiable. The proof in the record discovers that this note was non negotiable, being held as collateral security, and then again. the mortgage was collateral for the note of $12,000, and not for its co-collateral note of $13,000.

Jones on Pledges, speaking of a note and mortgage held as collateral security for another debt, says: "But if the debt be not negotiable the pledgee of the mortgage will take it subject to the equities between the original parties." This singu lar anomaly arises in this suit.

The note and mortgage sued on are collateral to the $12,000 note, yet the mortgage sued on is made to appear as collateral alone to the $13,000 note which is wrongfully attempted to be collected as the principal debt, in other words, the appellees have been sued upon a conditional contract and not upon the original, in which two pieces of paper, collateral to the principal debt of $12,000. are so changed and transposed as to make the mortgage, which was collateral to the $12,000 note the principal debt abandon it, and dance subservient attendance upon its collateral note of $13,000.

Jones on Pledges, Sec. 144, says: "A debtor may give his own note and mortgage as collateral security for another note made by him or for any distinct debt. But there must be a debt to be secured distinct from that created by the note and

mortgage, otherwise these create the principal debt." The appellants have treated the $13,000 collateral note as the principal debt in their suit upon the mortgage, and used the note as evidence of the amount of the debt, yet, the record abounds with parol evidence proving that John Nash executed the $13,000 note only as collateral to the $12,000 note discounted in bank, the principal debt. This fact may always be proven by parol evidence. In section 82 of Jones on Pledges, the doctrine is thus stated.:

"Parol evidence is admissible to establish the fact that a transfer of negotiable paper was intended simply as collateral security, and not as an absolute transfer. Such evidence is admissible for this purpose upon the same grounds that it is admissible to show that an absolute conveyance of real or personal property was intended to operate only as a mortgage. It is always competent to show by parol that one to whom negotiable paper has been made or transferred in terms absolutely in fact holds it as security only."

Jurisdiction under the Statute of the 3d of March, 1875, in so far as the same relates to promissory notes, attaches *alone to promissory notes negotiable by the law merchant*, and here let us distinguish more markedly between the right of an innocent holder for value of commercial paper endorsed to him, before maturity, to recover somewhere against the maker, and his right to sue upon such paper in the Federal Courts. This analysis presents it more fully.

1. The right of the innocent holder of paper negotiable in form, for which he has paid value, to recover against the maker, under the rule established in the Supreme Court upon commercial paper executed by a citizen of one State to a citizen of another State, although there may be infirmities to said paper

attaching as between the promissor and promissee, where the Federal Jurisdiction is plenary.

2. The right of such holder where the commercial paper negotiable in form, has been executed by one citizen to another of the same State, and before maturity assigned to a citizen of another and different State to sue on such paper as assignee in the Federal Courts, under the statute of March 3d, 1875, where infirmities fatal to the paper attach as between the promissor and promissee, and where the Federal Jurisdiction is not plenary, but restricted to the negotiability of the paper at the time of assignment.

In the first of these divisions, the innocent holder of the paper, would recover, in the Federal Courts under the rule there established in full, without regard to any infirmities of the paper, as between the original parties. In the second division the innocent holder would not be bereft of his right to recover somewhere, where the rule administered in the Federal Courts prevails, but he can have no place or standing in the Federal Courts if the paper sued on were not negotiable by the law merchant at the time it was transferred to him. The record discovers proof conclusively showing that the $13,000 note was collateral to the $12,000 note and the law as conclusively shows that negotiable paper held as collateral security, whilst it is so fettered by pledge, is not negotiable. In determining therefore the question of jurisdiction, the Federal Courts will open the record and when they are satisfied that the proof discovers on final hearing or before, that the paper sued on is not negotiable by the law merchant, will surcease action, and dismiss the case, where it has been originally brought in the Federal Courts. This we contend is the law in the Federal forum under the rule there administered where the assignee is an innocent holder of

the paper, but where he holds the same in bad faith and with notice of the equities of the makers, he is invested with none of the rights which attaches to negotiable paper in the hands of an innocent holder, and of course no jurisdiction could attach in the Federal Courts under the Statute. The rule administered in the Federal forum as stated by Colebrooke on collateral securities in Sec. 161, is, "That the title of the endorsee for value, in good faith, without notice of defenses, to the mortgage security, is as free from antecedent equities, as his title to the negotiable note, when received before maturity, under like conditions, and he is entitled equally to enforce the one as the other.

This rule is followed by the Supreme Court of the United States and the Federal Courts, and in several State Courts.—Carpenter v. Longan, 16 Wall., 271; Sawyer v. Pickett, 19 Wall., 147; Kennicott v. Supervisors, 16 Ib., 452; Batesville Just v. Kauffman, 18 Ib., 157; New Orleans, etc., Co. v. Montgomery, 95, U. S. 16; National Bank v. Matthews, 98, Ib., 621; Swift v. Smith, 102, Ib., 442.

This rule we shall have occasion to show differs very widely from the rule in Ohio, and many other States. In commenting upon this rule which he approves in Sec. 161, Colebrooke says: "The contract of the maker of the note is to pay the sum named therein upon a certain day, to a person named or order or bearer.

The obligation of the mortgager contained in the mortgage deed, is also to pay the note upon like terms. Both engagements are the same, and the like enforcement as to each, free from antecedent equities, should be given the *bona fide* endorsee for value. The rules of estoppel in pais are invoked against the maker and mortgager where it is sought to assert secret equities

against an innocent person who has advanced money in good faith on the credit of the representations contained in the two instruments, the negotiable note and the mortgage security.

The Ohio rule is thus stated in Swan's Treatise, page, 398. "Although the mortgage, whether the note or bond is made negotiable or not, follows the transfer of the note as security, yet the mortgage does not partake of the peculiar characteristics of negotiable paper; that is, the mortgagor, although sued on the mortgage by a *bona fide* holder of a negotiable note secured by the mortgage, and as such holder entitled to judgment for the amount of the note against the mortgagor as maker, yet the latter may set up any equitable defences against the enforcement of the mortgage itself, which defences, if the note were sued upon, would be precluded on account of such holder, being a *bona fide* endorsee for value and without notice of such equities." 14 Ohio St. 396.

In section 171, of Colebrooke on Collateral Securities, the rule is thus stated:

"In Ohio, the endorsee of a negotiable promissory note, secured by mortgage, upon enforcing in equity the mortgage security, is subject not only to the equities of the original parties, but also to the equitable rights and titles of third persons. In the leading case in that State, the Court declined to affirm, that to mortgage, when made to secure a negotiable note, becomes, contrary to its general nature and qualities a negotiable instrument; or, that the transfer of such a note without the aid of any statute, or of any Judicial decisions except those of very recent date, has an effect upon the note itself, and draws after it and within one of the most important incidents of negotiability, a collateral contract having relation to the same debt. Mortgages being (the court says) mere choses in action; and

whether standing alone, or taken to secure negotiable or non-negotiable paper, they are only available for what is honestly due from the mortgager to the mortgagee. If they are assigned, either expressly or by implication, the assignee takes only the interest, which his assignor had in the instrument—acquires but an equity, and. upon the long established doctrine of Courts of Equity, is bound to submit to the assertion of the prior equitable rights of third persons. The endorsee, suing upon the note, may recover judgment for the full amount thereof. And where a note, payable on demand, was secured by mortgage, the mortgage became due under the same conditions as the note." Heller vs. Meis 2 Sup. Ct. R. 289. Union C. L Ins. Co. vs. Curtis 33 Ohio St. 343. Bailey vs. Smith, 14 Ohio St. 396.

The rule in a case of the nature, as the one at bar, is disposed of by the Supreme Court of Illinois, (Olds vs. Cummings, 31 Ill. 188.) with great ability and natural justice and equity, by Chief Justice Cayton. He said, "Mortgages are not commercial paper. It is not convenient to pass them from hand to hand, performing the real office of money in commercial transactions, as notes, bills and the like * * The note itself, though secured by mortgage, is still commercial paper, and when the remedy is sought upon that, all the rights incident to commercial paper will be enforced in the Courts of law. But when this remedy is sought through the medium of a mortgage, when that is the foundation of the suit, and the note is merely used as an incident, to ascertain the amount due on the mortgage, when the Courts of equity, to which resort is had must pause, and look deeper into the transaction, and see if there be any equitable reason why it should not be enforced. He who holds a note and also a mortgage, holds in fact two in-

struments for the security of the debt; first, the note with its personal security, which is commercial paper, and as such may be enforced in Courts of law, with all the rights incident to such paper, and the other, the mortgage, with security on land, which may be enforced in the Courts of Equity, and is subject to the equities existing between the parties. * * *

The assignee is required to inquire of the mortgagor if there is any reason why the mortgage should not be paid, but he should not be required to inquire of the whole world, to see if some one has not a latent equity, which might be interfered with by his purchase of the mortgage, as for instance a *cestin que trust.*"

In the case at bar, as in Olds vs. Cummings, the suit is upon the mortgage, and not upon the negotiable note to secure the payment of the mortgage, and it may be observed that unlike the case of Carpenter vs. Longan, 16 Wall *Supra*, the maker of the note alone signed the note, which was secured by a mortgage of the property of the wife of the maker of the note. The maker of the note, also with his wife, signed the mortgage. In the case of Carpenter vs. Longan, the husband and wife both signed the note and both signed the mortgage. In the last mentioned case, the question of jurisdiction was not agitated, nor does it appear that the citizenship of the assignor was of the same state as that of the makers of the note and mortgage.

The appellants also contend that the collateral securities in their hands, are held by them as innocent purchasers, yet according to the doctrine in Ohio on this subject, if such securities were held by the Commercial Bank of Cincinnati as collaterals for a pre-existing debt, and nothing more, the law would at once bereave them of the white robes of innocence, as they

would not be innocent holders. Roxborough vs. Messick, 6 Ohio St. 448; Rexner vs. Hatch, 7 Ohio St. 248, 255; Gebhart vs. Sorrels, 9 Ohio St. 461, 466; Cleveland vs. State Bank, 16 Ohio St. 236, 269; Copeland vs. Manton, 22 Ohio St. 398, 402; Pitts. vs. Foglesong, 37 Ohio St. 676, 680; S. C. 41, Am. Rep. 540.

This doctrine prevails in fifteen other States of the Union, Alabama, Arkansas, Iowa, Kentucky, Maine, Minnesota, Mississippi, New Hampshire, North Carolina, Pennsylvania, Tennessee, Virginia and Wisconsin.

The Supreme Court of the United States hold upon this branch of the subject also a different doctrine from the State of Ohio. *Vide* Railroad Co. vs. National Bank, 102 U. S. 14, 51.

The different rules established between the Federal Courts, and the Courts of Ohio, and other States, upon the subject of a mortgage executed to secure a negotiable note, and negotiable securities pledged for a pre-existing debt, have in a controlling sense conduced to the alleged transfer or sale of the paper sued on, and the production of suit in the Federal Courts, as we shall endeavor hereafter to establish by the law and fact of the case at bar, in what we shall now offer upon the subject of a

COLLUSIVE ASSIGNMENT

To confer jurisdiction under the Act of March 3d, 1875.

Collusive assignment solely to confer jurisdiction under the above mentioned Act has been severely condemned by this Court, where ever it has been called upon to pass upon the subject.

In the case of Hayden vs. Manning, 16 Otto, pp. 586 to 589 inclusive, this Court held that where the name of a plaintiff, who had no real interest in the controversy had been improperly and

collusively used to give jurisdiction in the Federal Courts, the case should be dismissed.

This Court said in its opinion in the case: "The suit does not really and substantially involve a dispute or controversy, properly within the jurisdiction of the Circuit Court, because the real controversy is wholly between citizens of the same State. The name of Manning, the plaintiff in the suit, has been improperly and collusively used, (in the language of this statute,) for the purpose of creating a case cognizable under it." Hawes vs. Oakland, 104 U. S. 450; Williams vs. Nottawa, 104 U. S. 209.

In the case of Williams vs. Nottawa, 14 Otto, pp. 2, 9, 13 inclusive, this Court said: "Under the Act of 1789, it was held in Smith vs. Kernochen, 7 How. 216, that this objection was one which could only be taken by plea in abatement; but in Barney vs. Baltimore, 6 Wall. 280, there was no such plea, and the bill was dismissed in this Court without prejudice, because it appeared in evidence that certain conveyances by means of which the citizenship of the parties was changed so as to give the Courts of the United States Jurisdiction, did not transfer the real interest of the grantors. But what ever may have been the practice in this particular under the Act of 1789, there can be no doubt what it should be under that of 1875. In extending a long way the jurisdiction of the Courts of the United States, Congress was specially careful to guard against the consequences of collusive transfers, to make parties. and made it the duty of the Court, on its own motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of the kind appeared. This was for the protection of the Court as well as parties, against frauds upon its jurisdiction; for as was very properly said by Mr. Justice

Miller, speaking for the Court, in Barney vs. Baltimore, *supra*: "Such transfers for such purposes, are frauds upon the Courts, and nothing more." Again the Court says: "Inasmuch, therefore, as it was the duty of the Circuit Court, on its own motion, as soon as the evidence was in, and the collusive character of the case shown, to have stopped all further proceedings and dismiss the suit, the judgment is reversed, and the cause remanded with instructions to dismiss the suit at the costs of the plaintiff in error, because it did not really and substantially involve a dispute or controversy within the jurisdiction of that Court, leaving the parties in interest to such remedies as they may each be entitled to for the recovery of any amount that may be due them respectively on the bonds they severally own. In this connection, we deem it proper to say that this provision of the Act of 1875 is a salutary one, and that it is the duty of the Circuit Court to exercise their power under it in proper cases. If they improperly dismiss a cause, their action in that behalf is expressly made reviewable here. Whether if a defendant allows a case to go on until judgment has been rendered against him, he can take advantage of the objection on appeal, or writ of error, we need not now decide.

That would be a different case from this. Here the party guilty of the collusion asks relief from a judgment against himself. In such a case, we deem it our duty to stop the case just where it should have been stopped in the Court below, and remit the parties to their original rights."

This case was cited with approval in 105. U. S. 180; 106, U. S. 525; 109, U. S. 125, 355, 356; 111, U. S. 386.

In the case of the City of Detroit, appellant vs. Dean and the Mutual Gas Light Co,, appellees, 16 Otto 537, 542 inclusive. the Court say:

"It was an attempt to get into the Federal Court upon a pre tense that justice was impossible in the State Court, owing to the excited condition of the public mind. The only party who could seek redress in the Federal Court, by reason of his citizenship, was willing to trust the local courts; and if a determination had not existed to force the controversy away from them, we have no doubt that the other directors would readily have agreed with him. The refusal to take legal proceedings in the local courts. was a mere contrivance, a pretense; the result of a collusive arrangement to create for one of the directors a fictitious ground for federal jurisdiction. The case comes, therefore within the purview, if not the letter, of the provisions of Sec. 5 of the Act of March 3d, 1875, defining the jurisdiction of the Circuit Courts of the United States."

This case was cited with approval 106 U. S. 589; 114 U. S. 146.

To the above may be added the following cases touching upon this subject: Marion vs. Ellis, 9 Fed. Rep. 367; S. C. 10 Fed. Rep. 410; Williams vs. Town of Nottawa, 3 Morr. Tr. 256; Delavenga vs. Williams, 5 Sawy. 574; Coffin vs. Haggin, 11 Fed. Rep. 219. The motives of the Commercial Bank, and their shadow, the appellants, will more fully appear *infra.* when the contention of the Commercial Bank in the matter of appropriating the proeeeds of the mortgage collateral of $7,000 of Ellen Nash, which was pledged by her, and her husband for the particular loan of $12,000, to the general account of John Nash & Co., and John Nash, instead of a payment upon said special loan. The Commercial Bank saw in the wreck of John Nash's affairs, that if they could get rid of the equities subsisting between John Nash and Ellen Nash, upon the special loan of $12,000, secured by the two mortgages upon the property of

Ellen Nash, and appropriate the proceeds of the $20,000 collateral furnished for the special loan to the account of John Nash & Co., and John Nash, until they were first satisfied, and then pay off the special loan of $12,000, that they would not only make good their several claims against John Nash & Co., and John Nash, and John Nash and Ellen Nash, but would be in position to further better their condition by purchasing in at a sacrificial sale the real estate mortgaged by Ellen Nash, in Logan County, Ohio. To do this they found it to be necessary to get rid of the jurisdiction of the Courts of Ohio, which protect the equities of the appellees, under the facts discovered in the record, as well as to place the claim in the hands of parties beyond the reach of those equities.

Another forum, where a different rule of law was administered, presented itself to the inventive brain of the Commercial Bank in the jurisdiction conferred upon the Federal Courts by the Act of March 3d, 1875.

This was readily seized upon by the bank, yet, there still remained wanting to complete their supposed right to the federal jurisdiction, an assignee for value, of another and different State, whom the law merchant would recognize as an innocent holder, without notice of equities The Bank at once set to work to find such an assignee or endorsee, and through their correspondence with the appellants as shown by the Transcript, behold these innocents readily and willingly appear in the person of Messrs. J. F. D. Lanier, Charles Lanier, John W. Ellis. Edward Winslow and D. B. Safford, partners as Winslow, Lanier & Co.

The record discloses their innocence to consist of their joint effort to assist the Commercial Bank in drowning and sinking forever the equities of Ellen Nash, and helping the Commercial

Bank upon its guaranty of collection and payment of the collaterals furnished by Ellen Nash and John Nash for the special loan, to certain moneys the Bank never could have collected upon their transactions with the Appellees in the Ohio Courts.

The Court below held that the proceeds of the $7,000 mortgage should be appropriated in payment of the special loan of $12,000 and not to the discharge of the general account of John Nash & Co., and John Nash individually. From this decree, denying the appropriation of the proceeds of the $7,000 mortgage to the general account of John Nash & Co., and the individual account of John Nash, the Commercial Bank, through its men of straw, the appellants, appeal to this forum. The vindication of Judge Baxter's decree against the wrongful appropriation of the proceeds of the $7,000 mortgage, is written in the law, both of the United States and England, the parent country from which our jurisprudence is derived

In the case of the Masonic Savings Bank vs. Bangs' Adm'r, decided by the Supreme Court of Kentucky, so late as May the 5th, 1886, and reported in Vol. 8, No. 1, of the Kentucky Law Reporter, of July, 1886. Judge Pryor in a masterly opinion reviews the whole ground covered by the appeal upon this point and we adopt his argument, as one so complete and exhaustive of the subject, that it would be in the nature of presumptous arrogance to attempt either to add to, or subtract from it. In rendering the opinion of the Court, he says:

"John B. Bangs, in the month of June, 1884, borrowed of the Masonic Savings Bank the sum of ten thousand dollars, for which he executed his note, payable in six months, with interest from date, and to secure its payment he pledged as collateral security 300 shares of the stock of the New Galt House Company. The nature of the pledge was indorsed on the back

of the note and is as follows: 'As security for the payment of the within note I have deposited with the Masonic Savings Bank 300 shares of the capital stock of the New Galt House Company, and authorize the said bank to sell the above described collaterals, and pass a good title thereto to the purchaser, if the within note is not paid at maturity, reserving the right to be notified in writing twenty days previous to the date and place of the contemplated sale.'

Bangs, the obligor in the note, died intestate in August, 1884, and the appellee, W. C. Kendrick, administered on his estate, and in order to a settlement with creditors filed a petition in the Louisville Chancery Court, to which the appellant (Masonic Savings Bank) was made a defendant. The estate of Bangs was not only involved, but utterly insolvent.

The Masonic Savings Bank being a large creditor of the estate, filed an answer and counter-claim setting forth its various demands, and among them the note for for $10,000. A judgment was asked by the bank for the sale of the stock pledged to secure the payment of that note. The administrator and the Bank consented by an agreed order that the bank should sell the stock, subject to the rights of the parties in interest. The stock was sold by the bank and realized, after the payment of all costs, the sum of $13,495.10. This sum satisfied the note and left a surplus of $3,536.45 cents, and the manner in which this surplus is to be distributed is the question presented on the appeal.

The Bank holding many other large claims against the estate asserts its right to apply this surplus to their payment, insisting that by the law merchant it has a lien over other creditors, and if not, having possession of the fund, its right to a set-off against the claim of the administrator cannot be denied.

We find no decision by this court determining the question involved, but the right of a bank to a general lien on the money and funds of the depositor in its vaults for the payment of the balance of the general account of the depositor is recognized by all the elementary books on the subject of banks and banking, and sustained by an unbroken line of American decisions. So when the depositor is indebted to the bank his funds in the bank may be applied to the payment of the debt at its maturity, and a failure of the bank to make such an application has been held to discharge the indorser or sureties.

The right to a set-off would also exist against the administrator or representative of the depositor attempting to recover the deposit after his death. Moore on Banking, pages 34, 35 and 36.

This doctrine as to the general liens of a bank or its rights to a set off does not control the question involved in this case.

It is equally as well settled that where the deposit is made for a special purpose with the knowledge and undertaking of the bank, that purpose must be carried out, or where the pledge is specific to secure a particular debt, the lien only applies to the debt intended to be secured by it. 'A security given for a contemporaneous advance of one thousand pounds by the banker was held not to be applicable against an indebtedness of five hundred pounds afterwards arising on the ordinary running account.' Moore on Banking, page 36.

In this case the intestate deposited with the bank three hundred shares of the New Galt House stock to secure the payment of the note for ten thousand dollars. The title to the stock was in the intestate subject to this pledge, and the bank had no right to sell more of the stock than would satisfy the debt it was given to secure. If two hundred shares had satis-

fied the debt the intestate, if living, could have maintained an action against the bank for the remaining one hundred shares. The debt having been paid, the pledger or owner would have been entitled to the immediate possession of the stock remaining unsold.

The administrator of Bangs consented that the whole of this stock might be sold by the bank, and when sold the special pledge having been satisfied, the surplus fund arising from the sale passed to the administrator. It was the property of the estate, and its conversion into money did not alter the rights of the parties. If the appellee, as the administrator, had paid off the ten thousand dollar note the whole of the stock would have belonged to the estate, and no lien could have been asserted against the administrator so as to have prevented a distribution among the general creditors.

The special agreement with reference to the particular debt repels the inference that it was pledged for any and all debts that might thereafter be owing the bank by the intestate. In Parsons on Contracts, vol. 3, 264, 265, the lien of the banker is thus stated: 'When a negotiable note is indorsed to a banker by the payee as collateral security for one only of several demands for which he is liable, the banker has no lien on such note as security on any other demand against the endorser.'

Kent, in his Commentaries, vol. 2, 775, states the rule: 'The pawnee will not be allowed to retain the pledge for any other debt than that for which it was made, even though the holder be a banker.'

In Duncan vs. Brennan, 83 New York, 487, it was held that personal property pledged for a particular loan can not, in the absence of a special agreement, be held by the pledgee for any other advance, and in that case it was also said that 'the gener-

al lien which bankers hold upon bills, notes, and other securities deposited with them for a balance due on general account can not exist where the pledge of property is for a specific sum and not a general pledge.'

In the case of the Neponset Bank v. Leland, 5 Met., Mass., 259, it was adjudged that 'where a negotiable note is indorsed to a bank by the payee as collateral security for only one of several demands on which he is liable, the bank has no lien on such note as security for any other demand against the indorser.'

In the case of Wycoff vs. Anthony and others, reported in 90th New York, 442, the bonds in controversy were pledged by the plaintiff as collateral security for a note of $8,000. The plaintiff tendered the firm the amount of the debt and interest, and demanded the securities. The defendants refused to deliver them unless the plaintiff would pay another claim of the defendants against the plaintiff for which the bonds had not been specifically pledged. The plaintiff then brought his action for the value of the bonds, alleging their conversion by the defendents. It was held that where securities are pledged to a banker or broker for the payment of a particular loan or debt, he has no lien on the securities for a general balance, or for the payment of other claims, and a recovery was permitted.

We have found no case decided by the courts of this country sustaining the position assumed by counsel for the appellant, and the English cases relied on, particularly the case of Davis vs. Bowsher, 5 T. R., 481, decided by Lord Kenyon, states the rule to be "that by the general law of the land a banker has a general lien upon all the securities in his hands belonging to any particular person for his general balance unless there be evidence to show that he received any particular security under

special circumstances which would take it out of the common rule.'

This general lien arises from the usage of trade, and the fact that the parties have made the pledge for the particular debt must be held to exclude the intention of creating or relying on a lien that would otherwise exist upon the general deposit account. It is a special deposit or pledge for a special purpose, and when that purpose is accomplished the lien ceases to exist. A general lien in such a case would be inconsistent with the special undertaking. Grant on Banking.

Counsel on each side in this case have bestowed much labor in prosecuting and reviewing the authorities on this question, and while some of the English cases would tend to sustain the claim of lien, the whole current of American authority is against such a doctrine."

In conclusion, the Appellants are shown to have participated with the Commercial Bank in all its bad faith, and were in fact never the owners, but at best sub-pledgees of the collateral, with full knowledge of their infirmities. Two days before the 14th of November, 1879, these collaterals were forwarded from Cincinnati by mail with this direction: "*I will thank you to place this note to the credit of the Bank under discount.*"

Within these two days from the forwarding of these collaterals from Cincinnati to New York, and their arrival there, there could have been no change of the above directions, and what follows after the 14th of November shows that they were not changed. On the 28th of November, 1879, fourteen days after the pretended purchase of the collaterals, the bank gave the following order and directions to the Apellants. "In your letter to them, please say nothing concerning the first two years' interest, as the sum collected by us from other collections may

not prove to be sufficient to pay the entire two years' interest, as it was supposed it would. In case this debt should not be paid at maturity, I have further to ask that you do not charge it to our account, but hold it so that suit can be brought by you if necessary. Inclose a letter to me from our attorneys, King, Thompson & Maxwell, which please read and return to me." Transcript 71. Here we trace to them all the knowledge the Commercial Bank had in its dealings with Messrs. King, Thompson & Maxwell, and the fact further is disclosed that any failure to charge the collaterals to the discount account of the Commercial Bank, was for the sole purpose of creating a case cognizable in the Federal Courts, for the order is expressed in these words: *But hold it so that such suit may be brought by you if necessary.*" Transcript page 71 December 3, 1879, Commercial Bank, continues the guaranty of collection and payment of the note, and with this guaranty was enclosed: "*Confirmation from Wm. Sherlock to the same effect.*" Sherlock, it will be remembered, was Trustee for the Commercial Bank. and as such held for the time the collaterals pledged to the Bank. Why were these directions made so long after the alleged sale of the paper, if the Bank's interest in it had ceased? And on December 10. 1879, Transcript pp. 71-2, the Commercial Bank, writing the Appellants, says: I have your favor of the 8th inst. inclosing copy of a letter from Messrs. Avery & L'Hommedieu, attorneys for John Nash. I shall be obliged if you will reply to Messrs. Avery & L'Hommedieu, notifying them that unless the debt is immediately paid or satisfactorily arranged; the note and mortgage will be put in suit by you.

In case suit becomes necessary, I will thank you to place the papers in the hands of the Hon. R. P. Ranney, Cleveland, O., (unless you prefer other counsel,) with instructions to bring

suit in the U. S. Circuit Court to foreclose the mortgage in your name.

You will please refer Judge Ranney to Messrs. King, Thompson & Maxwell, our attorneys, for any information required for the suit. Of course we will bear all the expenses."

Again, on the 20th of February, 1880, the Bank writes the Appellants:

"Your favor of the 19th inst. is at hand. I will thank you to send the note and mortgage of John Nash to Judge Ranney, of Cleveland, in accordance with the terms of my letter of the 10th of December." Transcript page 72.

Here the attorneys of the Appellants was referred to Messrs. King, Thompson & Maxwell for any information required for the suit, and it is a plain question that in cases of notice, even where one's attorney has notice, the client in the particular transaction is affected with constructive notice, but here the Appellants had actual notice. Again from the character of the attorneys, Messrs. King, Thompson & Maxwell, it would not be credited for a ~~movement~~ moment that they would have advised their clients, the Commercial Bank, to sell collateral securities held for the payment of a principal debt, for such sale would be plainly against the law, and in some States is made by Statute a criminal offense. Gen. Sts. Mass c. 161, 64.

The statements therefore of the Appellants to the interrogatories charitably considered, can only amount to this fact that they believed as sub-pledges they were owners, otherwise their evidence would be knowingly and wilfully false. Transcript pp. 18-19.

It is clear that the Bank had no right to sell the collaterals, and it is incredible that Messrs. King, Thompson & Maxwell would have advised the Bank that they had the right to sell the

collaterals, and the record shows that the correspondence betweeu Messrs. King, Thompson & Maxwell, and the Bank was in the hands of the Appellants with directions to return it to the Bank, and after this date, which was November 28, 1879, received the guaranty of collection and payment of said note. Transcript page 71 — Exhibits "G" and "H" of Foote's deposition.

The whole stream of Federal authorities from the formation of the Government to the act of March 3, 1875, would be against the Jurisdicton of the Federal forum to take cognizance of this case or one similar to it.

It is therefore under the act of March 3, 1875, that the appellants assert their right to be heard in the Federal Courts, Sec. 5 of said act *supra* clearly deprives them of all such right in the case at bar.

Again if this court were to construe the act of March 3d, 1875, so as to include within the Jurisdiction of the Federal Courts all promissory notes negotiable in form, made between citizens of the same State, and assigned to a citizen of another and different State, before maturity, without regard to the negotiability of the paper to give such jurisdiction; when all the facts and equities existing between all the parties are shown by the record to have existed at the time of the transfer, then indeed the act will have been productive not only of the evil of creating two laws for the government of such paper in each State where the equities between the original makers of the paper are let in, that is the Federal law, and the State law, which are *felo-de-se* to each other, but will afford under the Federal rule an impenetrable shield to fraud wherever the crafty assignor of the State where the note was made, can find an innocent purchaser in another State.

These crafty assignors from sixteen States of the Union, viz: Alabama, Arkansas, Iowa, Kentucky, Maine, Mississippi, Missouri, Nevada, New Hampshire, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Vermont and Wisconsin, will always find enough confiding innocents from thirteen States of the Union, in which they abound, who will at a single leap spring into the Federal forum crying for protection, derived through the doctrine of estoppel in *pais* against the equities of all the dupes who have been victimized by the fraudulent assignors of the sixteen States.

This state of case arises where collaterals are assigned for a pre-existing debt, and no more, and out of which the greatest conflict of law arises between the several States and the general Government, yet upon the other branch of the case, namely: A mortgage executed to secure a negotiable note, which constitutes the principal debt, where the equties between the makers or original parties to the note, are let in, as in the case of Ohio, Illinois, Minnesota, Louisiana, South Carolina, and Vermont, there will be a like conflct, and of this latter class the kinship of the case at bar is nearer in degree, and would be identical were it not for the anomaly, that here, the mortgage sued on, was co-collateral to the collateral note of $13,000, and not the principal debt represented by the $12,000 note, and in this last feature, it is unlike all the cases, which have been adjudicated in the Courts, State or Federal.

If the Act of 1875 should be so construed as to hold notes, where the original parties are citizens of the same State, and are assigned to a citizen or citizens of another State, to be non-negotiable, where all the secret equities between the original parties, would stamp them as non-negotiable at the time of the transfer, and that these equities may be shown for that purpose

in the record on the final hearing, then this conflict of authority which would otherwise arise is avoided, and justice is administered between all parties, as it would be between the original parties to the note in the State where they reside and the notes were made, and we would avoid the anomaly of one people, and one land, and two governments, over the same people, and same land, holding upon the same subjects by their Courts of last resort, two different rules or laws upon the same subject where there should be but one, and this is in accordance with the genius of our Government, which makes both the Federal and State Jurisdictions, the empire or rule of one people and one land. It is therefore respectfully submitted that this cause should be dismissed for want of jurisdiction.

DAVID STUART HOUNSHELL,

Attorney for Appellees

121-404

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 200.

J. F. D. LANIER *et al.*, *Partners as Winslow, Lanier & Co.*, *Appellants*,

vs.

JOHN NASH *et al.*, *Appellees.*

APPEAL IN EQUITY

From the Circuit Court of the United States for the Northern District of Ohio, sitting in Chancery at Toledo.

BRIEF OF DAVID STUART HOUNSHELL,

ATTORNEY FOR APPELLEES.

November 29, 1886.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 200.

J. F. D. LANIER *et al., Partners as Winslow, Lanier & Co., Appellants,*

vs.

JOHN NASH *et al., Appellees.*

STATEMENT.

The motion rests upon the solid foundation that two live and subsisting judgments or decrees cannot be at the same time resting upon the same original cause of action.

William Goodrich, a party to this suit, at the October Term of the Court of Common Pleas of Logan County, Ohio, in the year 1880, obtained a judgment against the appellees, John Nash and Ellen, his wife, for the sum of eight hundred dollars ($800.00), and costs in the sum of one hundred and forty-three dollars and eighty-five cents ($143.85), and this judgment became a lien upon the lands of the appellants on the nineteenth day of October, 1880, that being the first day of said term of court.

On the seventh day of July, 1881, William Goodrich filed his answer and cross-bill against the appellees, John and Ellen Nash, praying that all liens against said lands be marshalled, and that the lands be sold under the order of the Circuit Court of the United States for the Northern District of Ohio. (See Answer and Cross-petition of William Good-

rich, Transcript, pp. 21, 22.) The relief he prayed for in the cross-bill was granted. (See Transcript, pp. 22 and 84.)

In the final decree (on page 84 of the Transcript), the relief prayed for by Goodrich was granted in the following decretal order of sale:

"And it further appearing that there is due from John Nash and Ellen Nash to the defendant, William Goodrich, the sum of one thousand and nineteen and 85-100 dollars, by virtue of a judgment of the court of common pleas of Logan county, Ohio, and the same is a lien upon the real property of said John and Ellen Nash in said county, from the 19th day of October, 1880; and it is, therefore, ordered that said John Nash and Ellen pay to said several named defendants the sums so as aforesaid found due within ten days, in default of which there be paid to said several named defendants out of the proceeds of the sale hereinbefore provided for, after satisfying the liens and amounts hereinbefore specified, to the complainants and to the defendants, Maurice Walsh and Johanna Mahon, the said several sums so last above found due the defendants, in the order and priority of liens as above named."

The final decree in the case was suspended in whole by an appeal-bond and *supersedeas*, and the same is now pending and undetermined in this court. (See Transcript, pp. 84–85.) This final decree merges the judgment sued on in the cross-bill of Goodrich, and all remedies at present in his behalf are suspended by the appeal and *supersedeas*, otherwise he may have enforced his decree by execution, or any of the other means provided by rules eight (8), nine (9) and (10) of the Practice in Equity. (See Phillips' Practice, pp. 452, 453.)

BRIEF FOR APPELLEES.

That the judgment sued on by Goodrich is merged in the final decree in this suit is established by irrefragable authority.

The doctrine is thus laid down by Freeman on Judgments, chapter 11, sec. 216: "The weight of authority in the United States shows that whatever may be a cause of

action will, if recovered upon, merge into the judgment or decree A contract of specialty merges into a judgment in the same manner as a simple contract. *A judgment is extinguished, when, being used as a cause of action, it grows into another judgment.* It may even be merged by a statutory judgment. Thus, if the law provides for the execution of a forthcoming or delivery bond, which, when forfeited, shall have the force and effect of a judgement on which execution may be issued, a forfeiture of which bond disharges the judgment upon which it was given.

"On the other hand (the citation continues) some American cases, proceeding upon the theory that no merger can take place until some higher remedy or evidence is created, deny that one judgment can merge into another of equal degree. On this ground a motion to enter satisfaction of a judgment because it had been recovered upon in another action was denied. The effect of this ruling would be that the estate of the debtor could be involved by a multiplicity of record liens, and his chattels seized under a great number of executions and himself financially ruined by the expenses of diverse proceedings, all based upon a single and indivisible demand."

To sustain the positions in the text, the following authorities are cited (in foot-notes). Pitts *vs.* Fugate, 41 Mo., 405; King *vs.* Hoar, 13 M. and W., 494; Andrews *vs.* Varrell, 46 N. H., 17; Chitty *vs.* Glenn, 3 Monr., 425; Whiting *vs.* Beebe, 7 Eng., 549; Gould *vs.* Hayden, 63 Ind., 443; Frazier *vs.* McQueen, 20 Ark., 68; Brown *vs.* Clark, 4 Howard, U. S. 4; Bank of U. S. *vs.* Patton, 5. How. Miss., 200; Wright *vs.* Yell, 13 Ark., 503; Hanna *vs.* Guy, 3 Bush, 91; Cook *vs.* Armstrong, 25 Miss., 63; Neal *vs.* Jeter, 20 Ark., 98; Black *vs.* Nettle, 25 Ark., 606; Russell *vs.* Shute, 25 Ark., 469; Lipscomb *vs.* Grace, 26 Ark., 234. But a different rule prevails in Alabama, (see Patton *vs.* Hamner, 33 Ala., 307.) In Kentucky, a person having pleaded guilty to an indictment charging him with being a common gambler;

was adjudged to make his fineto the Commonwealth by the payment of fifty dollars. For this fine a *capias pro fine* was awarded against him, which he replevied, with one W. as his surety. At the maturity of the replevin bond execution issued thereon, and was returned unsatisfied. After this a second *capias pro fine* was issued, but it was, on motion, quashed on the ground that the original judgment levying the fine had been merged in the replevin bond. (Commonwealth *vs.* Merigan, 8 Bush, 132.)

The last judgment, or decree, rendered either upon a judgment or decree, or any demand of a lower grade or dignity, must of necessity merge the cause of action sued on. Freeman on Judgments, chap. 12, sec. 332, says: "Rights acquired by virtue of a judgment or decree are liable to be determined in the same manner. Thus, if two Mexican grants are so confirmed at different dates, that the land is included in both decrees, and the confirmee of the first grant, being a party to the second confirmation, fails to assert the former decree in his favor as a bar, his rights will be divested by the second decree. So, where A. forecloses a mortgage makes B. a party to the suit, as a subsequent incumbrancer, and obtained a degree against B. as such, and B. afterwards forecloses his mortgage, making A. a party as a subsequent incumbrancer, and also obtained a decree, it was decided that if A. 'wished to avail himself of his decree he should have set it up in the second action, and that not having done so his rights under it were lost.'" (See Cooley *vs.* Brayton, 16 Iowa, 10.)

Decrees and judgments now stand upon the same plane. In section 434, chapter 17, Freeman on Judgments, says: "In the United States we lay it down as a general rule that in every instance in which an action of debt can be maintained upon a judgment at law for a sum of money awarded by such judgment, the like action can be maintained upon a decree in equity, which is for an ascertained and specific amount and nothing more, and that the record of the pro-

ceedings in the one case must be ranked with, and responded to, as of the same dignity and binding obligation with the record of the other." (See Pennington *vs.* Gibbons, 16 Howard, U. S., 65; Post *vs.* Neafie, 3 C. A. I., 22; Tilford & Co. *vs.* Oakley, Hemp., 197; Nations *vs.* Johnson, 24 Howard, U. S., 203; Evans *vs.* Tatem, 9 S. R., 252; 11 Amer. Decisions, 717; Warren *vs.* McCarthy, 25 Ill., 95.)

Special attention is called to the judgment of the Court of Common Pleas of Logan County, as stated in the answer and cross-bill of Goodrich, and the decree thereon which was "expunged," in so far as they differ from the final decree rendered on said judgement. (See Transcript, pp. 21, 22, 23, and pp. 81, 82, 83, 84.)

The final decree, being suspended by the appeal and *supersedeas*, cuts off all remedies, everywhere, for the present, that Goodrich may have based upon his original cause of action or judgment. Yet he now has an execution in the hands of the sheriff of Logan County, Ohio, issued upon the extinguished judgment of the Court of Common Pleas of that county. But for the suspension of the final decree of the Circuit Court of the United States for the Northern District of Ohio, by the appeal and *supersedeas*, Goodrich might have proceeded by execution to enforce his moneyed decree as provided by Rule 8 of the Rules and Practice in Equity, for this last decree is a new debt. (See sec. 217, chap. 11, Freeman on Judgments.) This doctrine reaches to the extent of discharging the lien upon the land of the judgment at law, which but follows the extinguished judgment.

By sec. 388, chap. 14, of Freeman on Judgments, the law is thus stated: "The merger occasioned by one judgment being recovered by another, as it extinguishes the judgment sued upon as a cause of action, also destroys its effect as a lien."

In the case of the United States *vs.* Leffler, 11 Peters, 86, Barbour, J., in delivering the opinion of the court said: "If this were so, then it would follow that another judgment

might be obtained against him; but we have seen that there is already one against him unreversed and irreversible; if, then, another could be obtained, we should have an anomaly never before heard of in the law; that is to say that there would be two subsisting judgments in full force at the same time in favor of the same plaintiffs against the same defendants, founded on the same original cause of action, and in both of which he would be liable to execution. This can not be. If there be any one principle of law settled beyond any question it is this: That whenever a cause of action, in the language of the law, *transit in rem judicatum*, and the judgment thereon remains in full force, unreversed, the original cause of action is merged and gone forever."

This anomaly, in jurisprudence, is sought to be established by Goodrich and his advisers in suing out the execution now in the hands of the sheriff of Logan County, Ohio, upon the defunct judgment. To obviate the evils of such procedure this motion is made, and a restraining order asked inhibiting Goodrich from all further proceedings until the determination of this case upon appeal.

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